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CONSTRUCTION OF STATUTE MAKING IT CRIMINAL FOR MEMBERS OF CONGRESS TO SELL THEIR INFLUENCE.

The severe sentence recently imposed on United States Senator Burton, of Kansas, for using his influence with the post office department in the interest of a private business enterprise, calls attention to a section of the federal statutes that hitherto has enjoyed too much obscurity. That section is 1781, Rev. Stat. U. S., and provides as follows:

"Every member of congress * * * who, directly or indirectly, takes, receives, or agrees to receive, any money, property, or other valuable consideration whatever, from any person for procuring, or aiding to procure, any contract, * * * from the government or any department thereof, * * * for any person whatever, * * * shall be punished," etc.

Senator Burton was convicted of accepting a retainer as an attorney for a company engaged in the promotion of a scheme for gambling, and agreeing to use his influence to induce the post office department not to interfere with the passage of the company's mail through the postoffice channels. The defense that Senator Burton merely sold his services as an attorney, and not as a senator, was held by the court to be without merit, there being no legal services to be rendered.

Another recent case construing this act is that of *United States v. Driggs*, 125 Fed. Rep. 520. In this case the defendant, who aided in procuring a private contract from the United States government, received, as his compensation therefor, a non-negotiable note promising to pay a certain sum as the proceeds of the contract were received. The indictments were demurred to because barred by limitations, the defense reckoning from the date of the note. The state, however, insisted that the note did not constitute payment, and reckoned from the date of the receipt of each payment. The court sustained the contention of the state, holding that the note given in payment for such an obligation could not constitute the giving or receiving of "property" or a "valuable consideration," within the meaning of the statute,

such note being made unlawful and invalid by the statute itself; and that indictments under the statute, based on payments subsequently made and received in accordance with the terms of the note, were not barred by limitation, where such payments were made within three years, although the note was delivered more than three years prior to the finding of the indictments. In this case the court expresses itself in language scintillant with intense feeling, saying: "The instrument was tainted and made worthless by the statute itself. Could the same statute stamp as something valuable, as property, a writing whose existence it had inhibited? The statute declares that a member of congress shall not agree 'to receive any money, or property, or other valuable consideration whatever, from any person, for procuring * * * any contract * * * from the government.' If a member of congress and such person enter into an agreement to do this very thing, how can the agreement be regarded as property or a valuable consideration? Does the statute refuse the agreement life by prohibiting it, and at the same time, upon its interdicted birth, breathe life into it, and give it the characteristics, the protection and the equality of property? According to such argument, the statute kills and quickens the same agreement at the same instant. It stifles while it animates. It precludes its existence, and, being defied, attaches worth to its reality. Leavened and vitiated by guilt, and imbued and vivified by virtue, by the same statute! One seeks in vain for fit expression of the contrariety. It must be remembered always that the very same statute—the same section—that commands that it shall not be, is invoked to vitalize it into a valuable entity. The very same agreement for making which the defendants, under the statute, could be indicted, is exalted, by defendants' contention, to the state of lawful 'property' or 'other valuable consideration,' so that the defendants, under the same statute, could be indicted for giving or receiving it as such. The forbidden agreement denounced by this section, and demanding the full punishment provided for it, is claimed to have properties that give it worth, so that the parties to it may be punished by the same section for giving and receiving it as if it had merit and excellence. A statute that at one and the same

time could make the creation of an agreement a felonious offense, and yet esteem the very same agreement as property and a valuable consideration between the felons, would be curious in law and logic. It would be difficult to think well of a statute that should say to two men: "I will punish you for making an agreement, and yet I will regard that agreement as property and as a valuable consideration if you do make it, and also punish you for passing the agreement from one to the other simply upon the ground that it is such 'property' or 'other valuable consideration.'" Such alleged conjunction of validity and invalidity, such compounding of unlawful existence and legal existence, such fusing of corruption and incorruption into the same agreement, by the same statute, is not understandable. A statute that proclaims that an agreement is so noxious to the public good that the parties to it should be imprisoned for making and delivering it one to the other should not be interpreted to mean that such agreement is in any degree recognized by the law as sane, useful and marketable. The statute prohibited an agreement to do the act, and also giving or receiving compensation for doing it. It made either a punishable offense, but it did not intend to make the agreement property or a valuable consideration. Valuable consideration for what? For agreeing to do the act? That would make the agreement a valuable consideration for its own making. Of course, the mutual promises contained in the agreement might sustain it, if the statute did not punish on account of those very promises. But it is not intended to refine the argument. The occasion demands no niceties of reasoning. The very statement of the defendants' proposition should demonstrate its invalidity. It is so abhorrent to moral and legal conceptions, so inimical to plain reason, that some technical rules, elsewhere wholesome and properly applied, but now skillfully invoked by defendants' counsel, must be broken through and discarded, and ultimate vital judgments allowed to prevail."

Still another recent case involving the construction of this statute, is that of *United States v. Dietrich*, 126 Fed. Rep. 676. In this case Senator Dietrich of Nebraska was charged with having received a valuable consideration from one Jacob Fisher for procuring for said Fisher the office of postmaster at

Hastings, Nebraska. It appeared, however, that Senator Dietrich was elected on March 28, 1901, but that his credentials were not formally accepted by the senate until December 2, 1901, and that in the meantime the crime charged was committed. The court, on these facts appearing, directed a verdict for the defendant, holding that a person elected to the office of senator of the United States, until he has been accepted by the senate as a member and has assumed the duties of his office is not a "member of congress" within the meaning of the words of the statute making it a criminal offense for a "member of congress" to receive any money for procuring or aiding to procure for another any contract, office or place from the government. The court said: "The term 'member of congress' is not doubtful or ambiguous. In referring to congress we speak of members-elect, members and ex-members, and by these several expressions we convey different meanings well understood by all persons. One of these expressions is never used as the equivalent of another. When we speak of a member of congress we refer to one who is a component part of the senate or house of representatives; one who is in office, not out of office; one who is sharing the responsibilities and privileges of membership. Under the constitution each house of congress is the exclusive judge of the election returns, and qualifications of its own members. In addition, therefore, to an election or appointment on behalf of one of the states of the union, and to acceptance by the person elected or appointed, the favorable judgment of the senate upon his election, credentials and qualifications is essential to constitute one a member of the senate."

NOTES OF IMPORTANT DECISIONS.

MUNICIPAL CORPORATIONS — LIABILITY OF CITY OFFICIALS FOR INDEBTEDNESS CONTRACTED IN EXCESS OF CONSTITUTIONAL LIMITATION. — Enraged taxpayers are sometimes inclined to hold their public servants to strict financial responsibility for acts which involve the city in loss. But as long as such public servants can sustain a position that their actions in any particular instance, although unwarranted and unconstitutional, were not wanton nor criminal, they are not liable in damages for the results of their wrongdoing. This is the decision in the recent case of *Lough v. City of Estherville* (Iowa), 98

N. W. Rep. 308. In this case it appeared that the Iowa Code gave cities power to purchase or condemn grounds for the purpose of donation to a railroad company for station buildings, etc.; and section 886 required a petition to the council, and the submission of the question of donation to a popular vote. The court held that, proceedings under these sections being presumed to have been regular, city officials were not personally liable to the city for an indebtedness thus contracted in excess of the constitutional limitation.

The thought of the petition in this case seems to have been that the defendants having conspired together to fasten a further indebtedness upon the city, notwithstanding it was already indebted to the full constitutional limit, and having accomplished such result by the wrongful and unlawful issuance of warrants, which, in turn, were merged into a judgment, and the judgment paid by the proceeds of the bonds issued, and the city having lost the right to contest the validity of such bonds, both by reason of the lapse of time, and the fact that the same have passed into the hands of an innocent holder for value, therefore the defendants should be required, for the benefit of plaintiff and all other taxpayers of the city, to pay into the city treasury a sum of money sufficient to make payment, when presented, of the bonds so issued, principal and interest.

The court, in passing on the question as thus presented, said: "The proposition is unique, to say the least. It is fairly presented by the record, however, and is entitled to our deliberate consideration. That a taxpayer for himself and others, may sue in equity — proper allegations being made—for an injunction to restrain the officers of a municipal corporation from contracting an indebtedness in excess of the constitutional limit, has been held repeatedly. We need not cite the cases. They are familiar to all. But where a debt has been created notwithstanding the limitation, may the city officials, who by their official acts, have knowingly and wrongfully brought about such result be held personally liable for the amount of such debt; it being conceded that the city will be compelled to pay the same, although it has not yet done so? This is the question we have to deal with. Counsel for appellant does not cite any case holding that the mayor and the respective members of the council of a city may be held personally liable in damages because that municipal indebtedness in excess of the constitutional limit has been contracted or permitted. We know of no such case, and we cannot say that there is anything in reason or the spirit of our system of government that dictates the promulgation of any such rule at our hands. While a violation of the constitution in the respect in question is to be condemned, and the courts should interfere to prevent such violation whenever called upon so to do, yet we are not prepared to adopt the suggestion that an action for damages may be resorted to, as affording a proper means of redress, where a violation

has been accomplished. What might be said in a case where there had been a wanton dissipation of the corporate property, or an appropriation of its funds without form of justification or excuse, we need not determine, as no such question is here involved. It has always been the law that a public officer who acts either in a judicial or legislative capacity cannot be held to respond in damages on account of any act done by him in his official capacity. His act may be void as in excess of jurisdiction, or otherwise without authority of law, and he may be subject to impeachment and removal from office for corrupt practice, but he cannot be mulcted in damages."

KEEPING OILS FORBIDDEN BY POLICIES OF INSURANCE.

Every insurance policy contains a clause prohibiting the keeping on the insured premises certain articles of an inflammable character, or excluding the insurer's liability for certain articles deemed dangerous or which is considered as increasing the risk of the insurer. A policy lying before the writer contains a very good example of such a prohibitive clause. This policy provides that it shall be void, unless otherwise provided by agreement indorsed upon it, "if illuminating gas or vapor be generated in the described building (or adjacent thereto) for the use therein; or if (any usage or custom of trade or manufacture to the contrary notwithstanding) there be kept, used or allowed on the above described premises, benzine, benzole, dynamite, ether, fireworks, gasoline, greekfire, gun powder, exceeding twenty-five pounds in quantity, naphtha, nitro-glycerine, or other explosives, phosphorous, petroleum or any of its products of greater inflammability than kerosene oil of the United States standard (which may be used for lights and kept for sale according to law but in quantities not exceeding five barrels, provided it be drawn and lamps filled by daylight or at a distance not less than ten feet from artificial light)."

These prohibitive clauses have been steadily growing during the last fifty years, being carefully trimmed and extended by insurance lawyers to meet the ever increasing restrictions laid down and distinctions drawn by the judges in their decisions, until it would seem that nothing could be added to them unless the insurer was indifferent whether or not he destroyed the commercial value of the policy. In construing a policy containing such a clause the kind of articles in

general covered by it must be taken into consideration, and also the use to which they are to be put. Much litigation has arisen over such clauses in policies upon a stocks of goods situated in a "stores," and especially in a "country stores." And while this article is primarily limited to instances of oil or burning fluids, analogous cases will be used.

A policy placed upon a stock of goods situated in a store, to be retailed as such goods are usually retailed, is not necessarily avoided by the keeping of coal oil or even gun powder in such store, although the policy prohibits the keeping of such articles and contains a provision that if they are kept it shall be void, provided it be shown that it is the custom to keep articles of that kind and the amount kept did not exceed the amount usually kept in stores of the same kind in that, or even other, vicinity.¹ Thus where a policy was placed upon a store and the merchandise it contained, which was such as was "usually kept in a country store," "except as" was otherwise provided; and the clause "usually in a country store" was written in ink; while in the body of the policy was a written clause to the effect it should be void, unless otherwise provided by indorsement on it, any usage of trade to the contrary, if gasoline was kept on the premises, the court held that evidence could be introduced to show that gasoline was an article usually kept in a country store, during the day time, for sale, and therefore the keeping of it in that manner did not avoid the policy.² A policy placed upon a stock of goods in a country store contained a written clause providing that benzine should not be kept as a part of the stock without the consent of the insurer, but a written clause provided that the policy covered such articles "as is usually kept for sale in country stores;" and it was held that evidence was admissible to show that benzine came within the written clause.³ But where a policy on a store was to be avoided if gasoline was kept on the premises, and gasoline was brought to the store to be used in a gasoline stove in an upstairs room, having no

connection with the store but reached by an outside stairway, it was held that the terms of the policy were so violated as to render it void.⁴

If a policy on a stock of groceries kept for retail prohibit the use of the building for the purpose of storing goods denominated hazardous or extra hazardous, keeping oil for retail, in quantities not unusually large, is not a "storing" of the oil within the prohibitory clause of the policy.⁵ In fact, it has been held that the word "groceries" as used in commercial circles includes articles usually denominated hazardous by insurance companies.⁶ But where it was claimed that the contents of a barrel of petroleum avoided a policy on a stock of "merchandise," the policy expressly providing that no petroleum should be kept on the premises, it was held error for the court to charge the jury that "merchandise" included whatever it was customary to keep in a grocery, and if a supply of petroleum, such as was kept on the premises, was a part of the usual stock of a grocery, the policy was not avoided; for the reason that by the express terms of the policy petroleum was not to be kept in the grocery.⁷ Where a policy on a dwelling house prohibited the keeping of certain articles denominated "hazardous;" and afterward a grocery was established in the house, in which such hazardous articles were kept, it was held that the policy was avoided.⁸

Where a policy was issued on a "watchmaker's articles," it was held that parol evidence was admissible to show that the words used included small amounts of benzine and kerosine, although the policy contained a written clause preventing the keeping or use of inflammable substances.⁹ The same was held true of a manufacturer of brass clocks.¹⁰

¹ Boyer v. Grand Rapids Fire Ins. Co., 124 Mich. 455, 83 N. W. Rep. 124.

² Langdon v. New York, etc., Ins. Co., 1 Hall (N. Y.), 226; Renshaw v. Missouri, etc., Co., 103 Mo. 595, 15 S. W. Rep. 945, 23 Am. St. Rep. 904; New York, etc., Co. v. Langdon, 6 Allen, 581; London, etc., Ins. Co. v. Fischer, 92 Fed. Rep. 500.

³ Niagara Fire Ins. Co. v. De Graff, 12 Mich. 124.

⁴ Birmingham Fire Ins. Co. v. Kroegher, 83 Pa. St. 64, 24 Am. Rep. 147. See Whitmarsh v. Charter Oak Fire Ins. Co., 2 Allen, 581; Cerf v. Home Ins. Co., 44 Cal. 320, 13 Am. Rep. 165.

⁵ Davern v. Merchants, etc., Ins. Co., 7 La. Ann. 344.

⁶ Maril v. Connecticut Fire Ins. Co., 95 Ga. 604, 23 S. E. Rep. 463, 30 L. R. A. 835, 51 Am. St. Rep. 102.

⁷ Bryant v. Poughkeepsie, etc., Ins. Co., 17 N. Y. 200, affirming 21 Barb. 154.

¹ American Fire Ins. Co. v. Nugent, 7 Ky. Law Rep. 597; Leggett v. Etna Ins. Co., 10 Rich. Law, 202.

² Yoch v. Home Mutual Ins. Co., 111 Cal. 503, 44 Pac. Rep. 189, 34 L. R. A. 857; Barnard v. National Fire Ins. Co., 27 Mo. App. 26; Mechanic's, etc., Ins. Co. v. Floyd, 20 Ky. Law Rep. 1538, 49 S. W. Rep. 543.

³ Tubb v. Liverpool, etc., Ins. Co., 106 Ala. 651, 17 So. Rep. 615.

Temporarily keeping on the premises small quantities of benzine with which to clean machinery and furnish needful light will not avoid a policy.¹¹ This is especially true if the insurer knew at the time he issued the policy that oil was thus used on the premises.¹² So keeping benzine in proper quantities in a furniture repairing shop, or a retail furniture store, with which to clean the furniture,¹³ or paints or varnish¹⁴ or in a wagon shop¹⁵ will not avoid a policy. The use of gasoline in a factory, the use being necessary in the business,—only enough being kept for a single day's use,—will not avoid a policy.¹⁶ In the case of a rope factory the necessary use of fish oil was held not to avoid a policy, although it expressly prohibited the keeping of oil on the premises. The factory could not be operated without the use of fish oil.¹⁷

To keep a small quantity of gasoline in a dwelling house, with which to clean the clothes of the family, will not avoid a policy.¹⁸ So the same is true if kept to destroy vermin.¹⁹ The prohibition of the keeping or use of certain named oils will not prevent the use of one of such oils for illuminating purposes, such as naphtha²⁰ or kerosine.²¹

A policy issued on a drug store insuring such "articles as are usually kept for retail in drug stores," covers gasoline, benzine and other oils, if kept in reasonable quantities,

though the printed prohibitory clause declares that unless otherwise provided by agreement, endorsed on or added to it, the keeping of oils shall void the policy.²² So a policy on a wholesale drug store will not be avoided by keeping paints and oils.²³

A policy issued on a laundry, in which the use of gasoline is forbidden in any trade or manufacture, is not necessarily avoided by the use of gasoline therein; nor does it preclude proof of a custom of the use of gasoline in the business.²⁴

Necessarily a policy issued on a paint shop covers the oils kept therein for use in the ordinary course of trade.²⁵ Where a written rider attached to a policy provided that the insurance was against loss on "paints, oils, varnishes," etc., "and such other articles as are usually kept in a sign painter's and carriage painter's and trimmers' shop;" and a printed clause in the body of the policy provided that "this entire policy, unless otherwise provided by agreement thereon, or added thereto, shall be void if (any usage or custom of trade or manufacture to the contrary notwithstanding) there be kept, used, or allowed, on the above described premises, benzine," etc.; and it appeared in evidence that benzine was usually kept in a shop such as the one insured,—it was held that the prohibition with respect to benzine applied only when the article was not insured, and by insuring the benzine it was "otherwise provided, by agreement indorsed on the policy" that it might be kept on the premises.²⁶

A policy issued on a paint factory provided in writing that it might be used for "hazardous or extra hazardous" purposes. This was held to control the printed part of the policy which prevented the keeping of benzine.²⁷

²² *Ackley v. Phoenix Ins. Co.* (Mont.), 64 Pac. Rep. 665; *Phoenix Ins. Co. v. Flemming*, 65 Ark. 54, 44 S. W. Rep. 464, 39 L. R. A. 789.

²³ *Wilson Drug Co. v. Phoenix, etc., Co.*, 110 N. Car. 350, 14 S. E. Rep. 790.

²⁴ *Northwestern, etc., Co. v. Crawford* (Tex. Cir. App.), 59 S. W. Rep. 916. As to patent leather factory, see *Citizens Ins. Co. v. McLoughlin*, 3 P. F. Smith, 485.

²⁵ *Hartwell v. California Fire Ins. Co.*, 84 Me. 524, 24 Atl. Rep. 954.

²⁶ *Mascott v. Granite, etc., Ins. Co.*, 68 Vt. 253, 35 Atl. Rep. 75. See *Mascott v. First, etc., Ins. Co.*, 69 Vt. 116, 37 Atl. Rep. 255.

²⁷ *Russell v. Manufacturer, etc., Ins. Co.*, 50 Minn. 409, 52 N. W. R. p. 903.

¹¹ *Humbolt Fire Ins. Co. v. Mears*, 29 Pittsburg Leg. J. 365; *Mears v. Humbolt Ins. Co.*, 92 Pa. St. 15, 37 Am. Rep. 647; *O'Neill v. Buffalo Ins. Co.*, 3 N. Y. 122.

¹² *Carlin v. Western, etc., Co.*, 57 Md. 515, 40 Am. Rep. 440.

¹³ *Faust v. American, etc., Ins. Co.*, 91 Wis. 158, 64 N. W. Rep. 883, 30 L. R. A. 783.

¹⁴ *Haley v. Dorchester, etc., Ins. Co.*, 12 Gray, 545.

¹⁵ *Archer v. Merchant's, etc., Ins. Co.*, 43 Mo. 434 (half a barrel of benzine).

¹⁶ *Fraim v. National Fire Ins. Co.*, 170 Pa. St. 151, 32 Atl. Rep. 613, 37 W. N. C. 39 (a silver plating establishment); *Vielc v. Germania Ins. Co.*, 26 Iowa, 9, 96 Am. Dec. 83.

¹⁷ *Baumgardner v. Insurance Co.*, 1 W. N. C. 119.

¹⁸ *Columbia, etc., Co. v. American Fire Ins. Co.*, 59 Mo. App. 204, 1 Mo. App. Rep. 26.

¹⁹ *La Force v. Williams City Fire Ins. Co.*, 43 Mo. App. 518.

²⁰ *Putnam v. Commonwealth Ins. Co.*, 4 Fed. Rep. 753.

²¹ *Jones v. Howard Ins. Co.*, 117 N. Y. 103, 22 N. E. Rep. 578, 10 N. Y. St. Rep. 120; *Bennett v. North British, etc., Co.*, 8 Dal'y, 471; *Hall v. Insurance Co.*, 58 N. Y. 292, 17 Am. Rep. 255; *Bennett v. North British, etc., Ins. Co.*, 81 N. Y. 273, 37 Am. Rep. 501.

To use a naphtha torch with which to remove old paint, in order to repaint a house, will avoid a policy prohibiting the use of naphtha on the premises, or the use of the building so as to increase the risk. No naphtha in this case was used in the house, but was held to have been used "on the premises."²⁸ But where a policy provided that it should be void if gasoline was "kept, used or allowed" on the premises, and it was kept in the building that was being painted to fill the torches with which to burn off the paint, it was held that the policy was not avoided.²⁹

A common clause in fire policies is that if the risk be increased the policy shall be avoided. What is an increase of risk is always a question of fact, one to be determined by the jury.³⁰ Thus where a policy had in it such a provision, or if any one of the products of petroleum of greater inflammability than kerosene were used or kept on the premises, and at the time the policy was issued the owner of the premises was using coal as a fuel, but afterwards substituted for the coal a "reduced oil" of less inflammability than kerosene, it was held that the sole question was as to the method of using the oil and whether the hazard thereby was increased.³¹

But where the insured kept a jug of crude petroleum for medical purposes, and the evidence tended to show that the jug was dangerous and increased the hazard, it was held error for the court to refuse to charge the jury that if the risk was actually and materially increased the policy was avoided.³²

Evidence is admissible to show that the use of an alcohol lamp, which exploded and caused a fire, in finishing chairs, increased the hazard.³³ To put up a frame building near the one insured, in which is placed, after it is built, an incubator heated by the use of gaso-

line or kerosene is to increase the hazard.³⁴ Whether or not the keeping of an oil increased the risk is a question of fact concerning which experts may testify, even though the oil does not cause the fire; and the increased rate that would have been charged if the building had been insured with permission to keep the oil in it may be given in evidence.³⁵

Where the description in the policy amounts to a warranty that the goods kept in the building are not hazardous, the keeping of even a small amount of such goods will avoid such policy, even though the risk be not increased. Such was the case where the description inserted in a policy was a "stock in trade, consisting of not hazardous merchandise," and also containing a provision that the store should not be used for carrying on any trade or business or keeping any merchandise denominated hazardous within the terms of the policy.³⁶

Permission in a policy to keep petroleum on the premises for lighting purposes cannot be construed to give permission to keep it for fuel purposes.³⁷

If the policy prohibit the keeping of certain kinds of oil, the keeping of any but the prohibited kind will necessarily avoid the policy. Thus, where the use of camphene, spirit gas, burning fluid or chemical oils was prohibited, but the use of refined coal oil, kerosene or other carbon oil for lights, if drawn and the lamps filled by day, was permitted, it was held that the user of lard oil and candles, even though the lamps were filled at night, did not violate the terms of the policy.³⁸ But a clause in a policy prohibiting the keeping of petroleum prohibits the keeping of gasoline; for gasoline is a very dangerous product of petroleum.³⁹

"French Electric Fluid" has been held to be the equivalent of benzine.⁴⁰ Whether

²⁸ First Congregational Church v. Holyoke, etc., Ins. Co., 158 Mass. 475, 33 N. E. Rep. 572, 35 Am. St. Rep. 508, 19 L. R. A. 587. In this case the building was burned down by the use of the torch.

²⁹ Smith v. German Ins. Co., 107 Mich. 270, 65 N. W. Rep. 236, 30 L. R. A. 368.

³⁰ Pool v. Milwaukee, etc., Ins. Co., 91 Wis. 530, 65 N. W. Rep. 54; Williams v. People's Fire Ins. Co., 57 N. Y. 274; Atherton v. British, etc., Ins. Co. (Me.), 39 Atl. Rep. 1006.

³¹ Grand Rapids, etc., Co. v. American Fire Ins. Co., 93 Mich. 396, 53 N. W. Rep. 538.

³² Williams v. People's Fire Ins. Co., 57 N. Y. 274.

³³ Appleby v. Astor Fire Ins. Co., 54 N. Y. 253.

³⁴ Yentzer v. Farmers, etc., Ins. Co. 200 Pa. 325, 49 Atl. Rep. 767.

³⁵ Traders Ins. Co. v. Catlin, 163 Ill. 256, 45 N. E. Rep. 255, reversing 59 Ill. App. 162.

³⁶ Richards v. Protection Ins. Co., 30 Me. 273.

³⁷ White v. Western, etc., Co., 18 W. N. C. (Pa.) 279, 6 Atl. Rep. 113.

³⁸ Carlin v. Western, etc., Co., 57 Md. 515, 40 Am. Rep. 440.

³⁹ Kings County Fire Ins. Co. v. Swigert, 11 Ill. App. 590. In the absence of proof, the court cannot hold that kerosene oil is a "burning fluid or chemical oil." Mark v. National Fire Ins. Co., 24 Hun, 565.

⁴⁰ Phoenix Ins. Co. v. Shearman 117 Tex. Civ. App. 456, 43 S. W. Rep. 930.

benzine is a "burning fluid or chemical oil" within the meaning of a policy on a distillery forbidding the keeping of "camphene, spirit gas, or any burning fluid or chemical oils" has been held to be a question of fact.⁴¹ The phrase "camphene, spirit gas, naphtha, benzine or benzole, chemical crude or refined coal or earth oils," does not prevent the use of kerosene oil, that part of the phrase "crude or refined coal or earth oils" being limited by the remaining words used in the sentence.⁴² Where a policy forbade the use in the building of petroleum, and the assured used what he supposed was a mixture of sperm and lard oil, but which was in fact a compound of those two oils with petroleum, it was held that there was no breach of the policy.⁴³

It has been held that the occasional use of articles denominated hazardous will not avoid a policy conditioned against their use,⁴⁴ such as benzine, with which to clean carpets.⁴⁵ But, as a general rule, the amount of the use of the prohibited articles is not material. Such was held to be the case where naphtha was used but once.⁴⁶

It is immaterial, in determining whether or not the use of the prohibited article forfeited the policy, that the loss was not occasioned by the use; for if the article is used or kept contrary to the terms of the policy, such policy will be avoided.⁴⁷ But in this respect the

courts are not in harmony, it being held in a number of cases that, in such instances, the policy is not avoided,⁴⁸ especially if the prohibited article was not upon the premises when the loss occurred.⁴⁹

Not infrequently the question has arisen what is a "storing" or "keeping" of prohibited oil on the premises. Usually the keeping of enough oil for the retail trade, as retailers in that particular business usually do, is neither a storing or keeping within the usual prohibitive clause of a policy. A grocer is an illustration of this rule. The company insuring a grocery stock must have intended that the assured should keep such oils in such quantities as retailers of groceries in that vicinity were in the habit of keeping; and therefore the keeping or storing of them is not within the meaning of those words as used in the policy.⁵⁰ Even the keeping of gasoline in reasonable quantities by a grocer will not avoid a policy preventing its storage or keeping.⁵¹ The keeping of a barrel of prohibited oil, with bunches of cotton near it, has been held not to render the policy void.⁵²

A policy declared that flax was a hazardous article and provided that the building should not be "appropriated, applied or used" for the storage of hazardous articles. The building had been used for storing flax dressing machinery but before the policy was issued the machinery had been removed and a carding machine put in. A small quan-

⁴¹ *Mears v. Humboldt Ins. Co.*, 92 Pa. St. 15, 37 Am. Rep. 647.

⁴² *Morse v. Buffalo, etc., Ins. Co.*, 30 Wis. 534, 11 Am. Rep. 587.

⁴³ *Copp v. German-American Ins. Co.*, 51 Wis. 637, 8 N. W. Rep. 127, 616. A prohibition of nitroglycerine includes giant-power, the latter being composed almost wholly of the former. *Sperry v. Springfield, etc., Ins. Co.*, 26 Fed. Rep. 234, 15 Ins. L. Jour. 270.

⁴⁴ *Merchants, etc., Ins. Co. v. Washington, etc., Ins. Co.*, 1 Handy, 408, affirming *Id.* 181; *La Force v. Williams, etc., Ins. Co.*, 43 Mo. App. 518.

⁴⁵ *Bently v. Lumberman's Ins. Co.*, 191 Pa. St. 276, 43 Atl. Rep. 209.

⁴⁶ *Watson v. Farm Building Fire Ins. Co.*, 73 N. Y. 310, 29 Am. Rep. 149, reversing 9 Hun, 415; *Heron v. Phoenix, etc., Ins. Co.*, 180 Pa. St. 257, 40 W. N. C. 55, 36 Atl. Rep. 740, 36 L. R. A. 517; *Wheeler v. Traders Ins. Co.*, 62 N. H. 326, 450; *McFarland v. Fire, etc., Ins. Co.*, 46 Minn. 519, 49 N. W. Rep. 253. One casual deposit in the building was held not to avoid the policy. *Hynds v. Schenectady, etc., Ins. Co.*, 11 N. Y. 554, affirming 16 Barb. 119.

⁴⁷ *Pennsylvania Fire Ins. Co. v. Faires*, 13 Tex. Cir. App. 111, 35 S. W. Rep. 55; *Williams v. Peoples Ins. Co.*, 65 N. Y. 274; *Faulker v. Ins. Co.*, 1 Kerr (N. B.), 279; *Trustees, etc., v. Williamson*, 26 Pa. St. 196; *Commercial Ins. Co. v. Mehlman*, 48 Ill. 313; *Couch v. Ins.*

Co., 25 Hun, 469; *Duncan v. Sun Fire Ins. Co.*, 6 Wend. 488; *Diehl v. Ins. Co.*, 58 Pa. St. 443; *Murdock v. Ins. Co.*, 2 N. Y. 210; *White v. Western, etc., Ins. Co. (Pa.)*, 6 Atl. Rep. 113.

⁴⁸ *Jones v. Howard Ins. Co.*, 117 N. Y. 103, 22 N. E. Rep. 578.

⁴⁹ *Traders Ins. Co. v. Catlin*, 163 Ill. 256, 45 N. E. Rep. 255, 59 Ill. App. 162. See *New England, etc., Ins. Co. v. Wetmore*, 32 Ill. 221; *Germania Fire Ins. Co. v. Kelewer*, 129 Ill. 599, 22 N. E. Rep. 489; *Phoenix, etc., Co. v. Munger (Tex. Cir. App.)*, 49 S. W. Rep. 271; *Traders Ins. Co. v. Race*, 142 Ill. 338; *Snyder v. Dwelling House Ins. Co.*, 59 N. J. L. 544, 37 Atl. Rep. 1022, reversing, 34 Atl. Rep. 931.

⁵⁰ *New York, etc., Ins. Co. v. Langdon*, 6 Wend. 623, 1 Hall (N. Y.), 253; *Maril v. Connecticut Fire Ins. Co.*, 95 Ga. 604, 23 S. E. Rep. 463, 51 Am. St. Rep. 102, 30 L. R. A. 835; *Moore v. Protection Ins. Co.*, 29 Me. 97, 48 Am. Dec. 514; *Phoenix Ins. Co. v. Taylor*, 5 Minn. 492.

⁵¹ *Renshaw v. Missouri, etc., Ins. Co.*, 103 Mo. 595, 15 S. W. Rep. 945, 23 Am. St. Rep. 904; *Columbia, etc., Co. v. American Fire Ins. Co.*, 59 Mo. App. 204, 1 Mo. App. Rep. 26; *Ackley v. Phoenix (Mont.)*, 64 Pac. Rep. 665; *City of New York v. Hamilton Fire Ins. Co.*, 10 Bosw. 537.

⁵² *Leggett v. Aetna Ins. Co.*, 10 Rich. L. 202.

tity of unbroken flax remained piled up in a corner of the room two days during which the building was burned. It was held that these facts did not show that the building was "appropriated, applied, or used" for storing or keeping flax.⁵³ The keeping by painters painting a house of a quantity of oil in the house, to be used in painting it, is not the storing of oil therein so as to avoid a policy.⁵⁴ In a Massachusetts case it was said that "the word 'kept,' as used in the policy, implies a use of the premises as a place of deposit for the prohibited articles for a considerable period."⁵⁵ Where an indorsement on a policy was "permission given to keep one barrel of benzine or turpentine in tin cans for use on the premises," the bringing of a barrel of benzine into the building, to be emptied into a large tin can, and while being so emptied it exploded, was held not to be a "keeping of benzine" within the prohibitory clause of the policy.⁵⁶ To merely carry gasoline through a store to deliver it at once, is not a keeping of it on the premises.⁵⁷

A mere privilege to use a gas apparatus, not actually exercised, nor intended to be exercised, but in reality abandoned, will not justify the insured in keeping and storing gasoline in a place and manner other than that allowed in the policy, on the theory that it could be used in such apparatus.⁵⁸

A clause prohibiting the keeping of oil "on the premises" insured cannot be so extended as to cover a building not insured,⁵⁹ although on the same lot.⁶⁰ The keeping of gasoline in the yard twelve feet from the insured building was held not to be a keeping on the insured premises.⁶¹ And where gasoline was

stored in a tank sunk in the earth thirty-five feet from a building to be used in lighting the building, it was held that the policy was not avoided.⁶² Where a mill was insured, but not its engine house, the keeping of oil in such engine house was held not to avoid the policy, the fire having originated in the mill and not in the engine house.⁷³ But the use of naphtha to burn off paint on a house was held to be the bringing of naphtha "on the premises."⁶⁴ Permission was given to remove insured goods to "the three story building occupied as a store, situated at No. 72 E. Street." Just back of the three-story building was a one-story addition which opened into it by a door and a window, which was included under the street number 72. For a long time previous to the granting of the privilege this addition was used as a part of the store, and in it some of the insured goods were deposited. It was held that this addition was such a part of the premises as to prohibit the keeping of gasoline in it.⁶⁵ And the use of gasoline for a stove in the upper story is the use of gasoline on the premises so as to avoid a policy on a stock of goods kept on the ground floor, although there be no connection between the two parts of the building.⁶⁶ So where a policy on a dwelling prohibited the keeping of gasoline "on the premises," but it was kept in a barn on the rear of the lot, and brought into the dwelling as needed and there used, it was held that the policy was avoided.⁶⁷

A policy provided that "the generating or evaporating within the building, or contiguous thereto, if any substance for a burning gas, or the use of gasoline for lighting" should render it void. After the policy was issued the owner manufactured gas from

⁵³ Hynds v. Schenectady, etc., Ins. Co., 16 Barb. 119, affirmed 11 N. Y. 554.

⁵⁴ O'Neill v. Buffalo Fire Ins. Co., 3 Com. St. 122.

⁵⁵ First Congregational Church v. Holyoke, etc., Ins. Co., 158 Mass. 475, 33 N. E. Rep. 572, 35 Am. St. Rep. 508, 19 L. R. A. 587.

⁵⁶ Maryland Fire Ins. Co. v. Whiteford, 31 Md. 219. See Williams v. Fire Ins. Co., 54 N. Y. 569, 13 Am. Rep. 620.

⁵⁷ London, etc., Ins. Co. v. Fischer, 92 Fed. Rep. 500.

⁵⁸ Liverpool, etc., Ins. Co. v. Gunther, 116 U. S. 113, 6 Sup. Ct. Rep. 306.

⁵⁹ Sperry v. Insurance Co., 22 Fed. Rep. 516; Hanover Fire Ins. Co. v. Stoddard (Neb.), 73 N. W. Rep. 291.

⁶⁰ Fireman's Fund Ins. Co. v. Shearman, 23 Tex. Cir. App. 343, 50 S. W. Rep. 598. See Ran v. Winchester Fire Ins. Co., 36 N. Y. App. Div. 179.

⁶¹ La Force v. Williams, etc., Ins. Co., 43 Mo. App. 518.

⁶² Queen Ins. Co. v. Sinclair, 1 Ohio Cir. Ct. Rep. 496. See Arkell v. Commerce Ins. Co., 69 N. Y. 190, 25 Am. Rep. 168, affirming 7 Hun, 455, and Northwestern, etc., Ins. Co. v. Germania Fire Ins. Co., 40 Wis. 446.

⁶³ Carlin v. Western, etc., Co., 57 Md. 515, 40 Am. Rep. 440.

⁶⁴ First Congregational Church v. Holyoke, etc., Ins. Co., 158 Mass. 475, 33 N. E. Rep. 572, 35 Am. St. Rep. 508, 19 L. R. A. 537.

⁶⁵ Boyer v. Grand Rapids Ins. Co., 124 Mich. 455, 83 N. W. Rep. 124.

⁶⁶ Phoenix Ins. Co. v. Shearman, 23 Tex. Civ. App., 43 S. W. Rep. 930.

⁶⁷ Pennsylvania Ins. Co. v. Faires, 13 Tex. Civ. App. 111, 35 S. W. Rep. 55.

gasoline in works constructed fifty feet from the building, and conducted it to such building by pipes laid in the ground. It was held that the gas works were not "contiguous" to the building within the meaning of the policy.⁶⁸ As a general rule, evidence is admissible to show the practice or custom of keeping prohibited articles in stock, where it is claimed that the policy has been avoided, instances of which have been given in cases of stores or groceries,⁶⁹ unless the terms used in the policy clearly exclude by name the offending oil.⁷⁰ An implied consent to the use of the insured building in the manner prohibited by the policy may be drawn from the use to which it was being put at the time the policy was issued or from the nature of the stock insured. Thus a policy on the stock in a store prohibited the keeping of gun powder; yet the stock insured was such an one as it was usual in which to keep gun powder. The keeping of gun powder in the usual quantities was held not to avoid the policy.⁷¹ Consent to use gasoline in a building in which silver-plating was carried on was held to be implied.⁷² A policy on household furniture situated in a dwelling house will not prevent the use of a gasoline stove, the term household furniture, by its terms, embracing gasoline stoves.⁷³ Where a

dwelling house was insured and then changed into a grocery, in which articles were kept for sale denominated as hazardous in the policy, the policy was held to have been so violated as to be void.⁷⁴

A policy may be issued under such circumstances as to constitute a waiver of its terms by the insurer. Knowledge on the part of the insurer at the time it issues the policy of the use to which the insured building is going to be put may, and frequently does, work a waiver of the prohibitory clause against the keeping of hazardous articles, or at least as to some of them. To hold, in many instances, that there was no waiver would often be to practically hold that the policy was never in force. Thus where a factory was run at night and lighted by "headlight oil," a product of petroleum, at the time the policy was issued, it was held that the clause in the policy forbidding the use of petroleum was waived by the issuance of it without any agreement concerning the use of the headlight oil.⁷⁵ If the insurance agent knows the prohibited article is kept on the premises, that the business carried on there is such as to require it to be kept, or that it is the insurer's intention to keep it, the prohibitive clause will be waived by the issuance of the policy.⁷⁶ Such was held to be the case concerning a woolen mill where naphtha had to be used with which to clean the wool.⁷⁷ This is especially true where the application for insurance shows the nature of the business and the kind of articles to be kept in the building, so that the nature and extent of the risk must have been known to the insurer.⁷⁸ The oral

would not be the case with fire works kept in a dwelling house. *Heron v. Phoenix, etc., Ins. Co.*, 180 Pa. St. 257, 40 W. N. C. 551, 36 Atl. Rep. 743, 36 L. R. A. 517.

⁷⁴ *Daven v. Merchants, etc., Ins. Co.*, 7 La. Ann. 344; *Cerf v. Home Ins. Co.*, 44 Cal. 320, 13 Am. Rep. 165.

⁷⁵ *Couch v. Rochester, etc., Ins. Co.*, 25 Hun, 469; *Rivara v. Queens Ins. Co.*, 62 Miss. 720; *Farmers, etc., Ins. Co. v. Nixon*, 20 Colo. App. 265, 30 Pac. Rep. 42; *Kruger v. Western, etc., Ins. Co.*, 72 Cal. 91, 13 Pac. Rep. 156.

⁷⁶ *Peoria, etc., Ins. Co. v. Hall*, 12 Mich. 202; *Kenton Ins. Co. v. Downs*, 90 Ky. 236, 12 Ky. L. Rep. 115, 13 S. W. Rep. 882; *Bartholomew v. Merchants Ins. Co.*, 25 Iowa, 507, 96 Am. Dec. 25; *American Fire Ins. Co. v. Nugent*, 7 Ky. L. Rep. 597. But see *Western, etc., Co. v. Rector*, 85 Ky. 294, 9 Ky. L. Rep. 3, 3 S. W. Rep. 415.

⁷⁷ *Wheeler v. Traders' Ins. Co. (N. H.)*, 1 Atl. Rep. 293.

⁷⁸ *City of New York v. Brooklyn Fire Ins. Co.*, Barb. 231.

⁶⁸ *Arkell v. Commerce Ins. Co.*, 69 N. Y. 191, 25 Am. Rep. 168, affirming 7 Hun, 455.

⁶⁹ *American, etc., Ins. Co. v. Green* (Tex. Civ. App.), 41 S. W. Rep. 74; *Mascott v. Granite, etc., Ins. Co. (Vt.)*, 35 Atl. Rep. 75; *St. Nicholas Ins. Co. v. Merchants, etc., Ins. Co.*, 11 Hun, 108; *Maril v. Connecticut Fire Ins. Co.*, 95 Ga. 604, 23 S. E. Rep. 463, 30 L. R. A. 835; *Humboldt Fire Ins. Co. v. Mears*, 29 Pittsb. L. Jour. 365; *Hall v. Insurance Co.*, 58 N. Y. 292, 17 Am. Rep. 255; *Citizens Ins. Co. v. McLoughlin*, 3 P. F. Smith, 485; *Tubb v. Liverpool, etc., Ins. Co.*, 106 Ala. 651, 17 So. Rep. 615.

⁷⁰ *Birmingham Fire Ins. Co. v. Kroegher*, 83 Pa. St. 64, 24 Am. Rep. 147.

⁷¹ *Kenton Ins. Co. v. Doves*, 90 Ky. 236, 13 S. W. Rep. 882; *Mascott v. Granite, etc., Ins. Co. (Vt.)*, 35 Atl. Rep. 75; *Phoenix Ins. Co. v. Flemming*, 65 Ark. 54, 44 S. W. Rep. 64, 39 L. R. A. 789; *Stout v. Commercial, etc., Co.*, 12 Fed. Rep. 554, 11 Biss. 309, 11 Ins. L. J. 688; *Sperry v. Springfield, etc., Ins. Co.*, 26 Fed. Rep. 234, 15 Ins. L. J. 270; *Steinbach v. Relief Ins. Co.*, 77 N. Y. 498, affirmed 13 Wall. 183; *Steinbach v. Lafayette Ins. Co.*, 54 N. Y. 90.

⁷² *Frain v. National Fire Ins. Co.*, 170 Pa. St. 151, 37 W. N. C. 39, 32 Atl. Rep. 613. See *Northwestern, etc., Co. v. Crawford* (Tex. Civ. App.), 59 S. W. Rep. 916.

⁷³ *American, etc., Ins. Co. v. Green*, 16 Tex. Civ. App. 531, 41 S. W. Rep. 74; *Snyder v. Dwelling House Ins. Co. (N. J.)*, 37 Atl. Rep. 1022. Such

consent of the agent of the insurance company, especially if given after the policy is issued, to the keeping of prohibited articles, will amount to a waiver of the prohibitive clause, even though the policy contain a provision that none of its terms shall be considered as waived unless indorsed upon it;⁷⁹ and after the loss the company will be estopped to set up a forfeiture of such policy.⁸⁰

But not in every instance will there be a waiver where the policy is issued, with a knowledge that a prohibited article was then kept and it was intended to keep it in the insured building, where the express terms of the policy forbid the keeping of it.⁸¹ Thus where the policy on a stock of hardware provided that none of its terms should be deemed waived except in certain instances by indorsement on the policy, the use of gasoline in small quantities to illustrate the operation of gasoline stoves offered for sale, was considered to work its forfeiture, although the local board taking the insurance knew the practice of the insured.⁸² And the fact that the local agent, with only power to solicit insurance, deliver policies and receive premiums, consent that the use of the building should be changed so as to use it for a restaurant in which gasoline stoves were used, will not amount to a waiver.⁸³ And the fact that the insurance company knew there were no gas pipes in the house insured, at the time it issued the policy, will not prevent a forfeiture by the use of a forbidden spirit lamp for lighting purposes.⁸⁴ If there be nothing in the application indicating the use to which the building is to be put, the insurer will not be deemed to have waived a clause prohibiting the use of gasoline on the ground that it had constructive notice of such use.⁸⁵ The fact that the rate charged was the same rate as that charged for an adjoining building in

which was included a charge for the use of gasoline, cannot be taken as a consent to use gasoline in the building involved in the controversy.⁸⁶

If a building be used for a purpose prohibited by the policy, and the insurer, with full knowledge of such use, receive premiums due on the policy, it will waive the forfeiture and cannot afterwards set up that the policy for that reason is void.⁸⁷ Especially is this true if the agent of the insurer told the insured, at the time the policy was issued, that an article prohibited by its terms could be kept,⁸⁸ or the company, being informed of the use prohibited, declines to fix an increased rate for the building.⁸⁹

If there had been a forfeiture because of improper articles being kept, objection to the proofs of loss tendered solely on another distinct ground, and the furnishing of new proofs to meet the objections made, will be a waiver of the right to afterwards insist upon a forfeiture in order to avoid liability.⁹⁰ This is especially true if the new proofs require additional expense from the insured.⁹¹

The act that will work a forfeiture of a policy must be the act of the insured, or the act of those under his control, with his knowledge. Thus, where workmen of the insured used matches in the shop contrary to the terms of the policy, the court instructed the jury that, to work a forfeiture of the policy, the use must have been by the insured's authority, express or implied; that what was going on in the premises he was bound to know; that if he knew, or, as a prudent man,

⁷⁹ *Reaper City Ins. Co. v. Jones*, 62 Ill. 458.

⁸⁰ *Queen Ins. Co. v. Harris* (Pa.), 2 Weekly N. C. 220.

⁸¹ *Western, etc., Co. v. Rector*, 85 Ky. 294, 3 S. W. Rep. 415, 9 Ky. L. Rep. 3; *Birmingham Fire Ins. Co. v. Kroeger*, 83 Pa. St. 64, 24 Am. Rep. 147.

⁸² *Fischer v. London, etc., Ins. Co.*, 83 Fed. Rep. 807.
⁸³ *Garretson v. Merchants, etc., Ins. Co.*, 81 Iowa, 727, 45 N. W. Rep. 1047.

⁸⁴ *Minzesheimer v. Continental Ins. Co.*, 5 J. & S. (N. Y.) 332.

⁸⁵ *McFarland v. St. Paul, etc., Ins. Co.*, 46 Minn. 519, 49 N. W. Rep. 253; *Georgia Home Ins. Co. v. Jacobs*, 56 Tex. 336.

⁸⁶ *Turnbull v. Home Fire Ins. Co.*, 83 Md. 312, 34 Atl. Rep. 875. In this case it was held that the failure of the broker procuring the insurance to inform the insured that gasoline could not be used was not a waiver, for he was the agent of the insured and not of the insurer. Nor will a broker's knowledge be imputed to the insurer. *Kings County Fire Ins. Co. v. Swigert*, 11 Ill. App. 590.

⁸⁷ *Keenan v. Dubuque, etc., Ins. Co.*, 13 Iowa, 375.

⁸⁸ *Carrigan v. Locomotive Fire Ins. Co.*, 53 Vt. 418, 38 Am. Rep. 687.

⁸⁹ *Witte v. Western, etc., Ins. Co.*, 1 Mo. App. 188. Perhaps a failure to cancel the policy, after knowledge on the part of the insurer of the prohibited use, will be a waiver of its terms so as to prevent it successfully resisting payment of a loss. *Farmer's, etc., Ins. Co. v. Nixon*, 2 Colo. App. 265, 30 Pac. Rep. 42.

⁹⁰ *Northwestern, etc., Ins. Co. v. Germania Fire Ins. Co.*, 43 Wis. 446.

⁹¹ *Garretson v. Merchants, etc., Ins. Co.*, 81 Iowa, 727, 47 N. W. Rep. 1047. See, however, *Phoenix Ins. Co. v. Lawrence*, 4 Metc. (Ky.) 9, 81 Am. Dec. 521.

ought to have known, that matches were used, then his order not to use them would not help him; and that the use prohibited meant a known and permitted use. This instruction was held to state the law correctly.⁹²

But the assured is liable for his tenant's act—the tenant's act being his act.⁹³ And this is true even though the landlord (the insured) did not know the tenant was violating the policy.⁹⁴

If the use of oil is permitted for a certain use or in a certain manner, it cannot be insisted that permission has been given for another and distinct use or in another and distinct manner. Thus, where oil could be used for lighting purposes in a factory, but the lamps had to be filled each day before dark, and the insured, after dark, by the light of a lantern, drew a quantity of oil from the barrel where he kept it, for another purpose, whereby a fire was occasioned, it was held that the policy had been annulled by the act of drawing the oil.⁹⁵ In another instance of the same kind, however, it was held that a recovery on the policy could not be defeated unless the loss was occasioned by the prohibited drawing of the oil set up as a defense.⁹⁶ So where oil in lamps could be used in the daytime, but must be extinguished at the close of the business of the day, it was held that the fact that sometime during the life of the policy a failure to extinguish the lamps at the time required would not work a forfeiture, unless the risk by such failure was increased.⁹⁷

A failure to disclose, at the time the policy is issued, that oil is habitually kept on the premises or contiguous thereto may be such a misrepresentation as will avoid the policy.⁹⁸

⁹² Farmers', etc., Ins. Co. v. Simmons, 6 Casey, 299.

⁹³ German Fire Ins. Co. v. Board, 54 Kan. 132, 39 Pac. Rep. 697; Kelly v. Worcester, etc., Ins. Co., 6 Mass. 284; Duncan v. Sun Fire Ins. Co., 6 Wend. 488; Badger v. Platts, 68 N. H. 222, 44 Atl. Rep. 296; Kohlman v. Selvaige, 34 N. Y. App. Div. 380, 54 N. Y. Supp. 230; Adair v. Southern, etc., Ins. Co., 107 Ga. 297, 33 S. E. Rep. 78.

⁹⁴ Kohlman v. Selvaige, *supra*. See, also, Liverpool, etc., Ins. Co. v. Gunther, 116 U. S. 113, 6 Sup. Ct. Rep. 306, 85 Fed. Rep. 846.

⁹⁵ Gunther v. Liverpool, etc., Ins. Co., 134 U. S. 110, 10 Sup. Ct. Rep. 448.

⁹⁶ Jones v. Howard Ins. Co., 117 N. Y. 103, 22 N. E. Rep. 578. See Carlin v. Western, etc., Ins. Co., 57 Md. 515, 45 Am. Rep. 440.

⁹⁷ Firemen's Ins. Co. v. Ceell, 12 Ky. L. Rep. 48, 259.

⁹⁸ McFarland v. Peabody Ins. Co., 6 W. Va. 625. The diagram furnished did not reveal the fact that the adjacent property was used for storage of oil.

The provisions of the "rider" controls the provisions of the printed clauses of the policy where there is a conflict between the written or the printed clauses or portions.⁹⁹

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⁹⁹ Yoch v. Home, etc., Ins. Co., 111 Cal. 503, 44 Pac. Rep. 189, 34 L. R. A. 857; Lancaster Fire Ins. Co. v. Lenheim, 89 Pa. St. 497, 33 Am. Rep. 778; Gunther v. Liverpool, etc., Ins. Co., 85 Fed. Rep. 846; Russell v. Manufacturers', etc., Ins. Co., 50 Minn. 409, 52 N. W. Rep. 906; Phoenix Ins. Co. v. Flemming, 65 Ark. 54, 44 S. W. Rep. 464, 39 L. R. A. 789; Faust v. American Fire Ins. Co., 61 Wis. 158, 30 L. R. A. 783.

ARMY AND NAVY—LIABILITY FOR DESERTION.

In re CADWALLADER.

In Chambers, United States Circuit Court, Eighth Circuit February 10, 1904.

A soldier who deserted after the signing of the protocol between the United States and Spain, and while a state of peace actually existed, and nothing remained to be done to conclude peace, except the settlement of the details of the treaty, is within Act April 11, 1890, ch. 78, 26 Stat. 54 [U. S. Comp. St. 1901, p. 968], providing that no person shall be court-martialed for desertion in time of peace, and not in the face of an enemy, committed more than two years before his arraignment therefor; said limitation not to begin till the end of his term of enlistment.

A deserter from the army, who has never been discharged from the service, is still subject to the jurisdiction of a military tribunal, so that, though he may plead the statute of limitations as a defense to a prosecution for desertion, a civil court will not interfere with such a prosecution by a military tribunal before that court has acted on and decided the case.

THAYER, Cir. J.: On January 18, 1904, a writ of *habeas corpus* was issued, at the instance of the petitioner, against Col. George S. Anderson, U. S. A., commanding officer at Jefferson Barracks, Missouri, requiring him to appear on January 23, 1904, to show by what authority he held the petitioner, George F. Cadwallader, in custody. The hearing appointed to be held on January 23, 1904, was deferred until February 10, 1904, on which day the respondent, Anderson, filed his return to the writ. The facts, as developed by the petition for the writ and by the return thereto, are not disputed, and are as follows: On May 31, 1898, Cadwallader enlisted in the army of the United States for the term of three years. On October 16, 1898, while his regiment was stationed at Huntsville, Alabama, the petitioner deserted the service, and returned to the city of St. Louis, Missouri, where he has since resided. On October 27, 1903, he was arrested for desertion at Sherwood, Missouri, and has since been confined in the guardhouse at Jefferson Barracks, Missouri, awaiting trial for the offense of desertion before a military court martial. Formal charges against him for deser-

tion have already been preferred, and he is now awaiting trial before the military court. While thus confined he applied for a writ of *habeas corpus*, which was issued, as heretofore stated.

An act of congress, which was approved on April 11, 1890 (26 Stat. 54, ch. 78, U. S. Comp. St. 1901, p. 968), amends the 103d article of rules and articles of war by adding thereto the following provision:

"No person shall be tried or punished by a court martial for desertion in time of peace and not in the face of an enemy, committed more than two years before the arraignment of such person for such offense, unless he shall meanwhile have absented himself from the United States, in which case the time of his absence shall be excluded in computing the period of limitation: provided, that said limitation shall not begin until the end of the term for which said person was mustered into service."

On August 12, 1898 (30 Stat. 1780), President McKinley issued a proclamation announcing that a protocol had been concluded and signed at Washington by the United States and a representative for the government of Spain, formally agreeing upon the terms on which negotiations for the establishment of peace between the two countries should be undertaken. In conformity with such protocol, which had been agreed upon and signed, the president declared and proclaimed that hostilities between the two countries should be suspended, and directed that orders be immediately given to the commanders of the military and naval forces of the United States to abstain from all acts inconsistent with his proclamation. Thereafter all United States troops were withdrawn from the theater of war, except those necessary for the protection of property and the police of the Island of Cuba. The Spanish troops in the island were returned to Spain, and on September 17, 1898, the United States began mustering out of service the troops which had been enlisted for service during the Spanish war. From and after the signing of the protocol, a state of peace in fact existed between the United States and Spain, and between the United States and all other countries. What remained to be done after the signing of the protocol was to settle the details of the treaty between the United States and Spain, whereby peace was concluded. This treaty was concluded and signed by the representatives of the two countries at Paris on December 10, 1898. Ratifications were exchanged at Washington on April 11, 1899, and the president's proclamation announcing the final conclusion of the treaty was published on April 11, 1899 (30 Stat. 1754).

The petitioner's term of enlistment expired on May 30, 1901. He was not arrested for desertion until after the lapse of two years and six months; his arrest having taken place on October 27, 1903. The petitioner insists that he deserted "in time of peace and not in the face of an enemy," and that, as more than two years expired after the end of

the term for which he was mustered into service before he was apprehended for desertion, the limitation prescribed by the act of congress of April 11, 1890, *supra*, has run, and that he cannot now be successfully prosecuted for desertion. I am of opinion that the petitioner is probably right in this contention. When he deserted the United States was practically at peace with Spain and with all other nations. While it is true that all the details of the treaty of peace had not been arranged, yet it was understood that the war was at an end, and would not be further prosecuted. The United States recognized that fact by commencing to disband its army, and had mustered out many of its regiments before the petitioner deserted. Desertion in time of peace is not as grave an offense as desertion when a state of war prevails, and congress has recognized that fact by prescribing a short period of limitation, after the expiration of which a soldier who deserts his colors in time of peace shall not be prosecuted. The expression found in the act of congress of April 11, 1890, *supra*, to the following effect, "in time of peace and not in the face of the enemy," when fairly interpreted means, I think, that, to entitle a soldier to claim the benefits of that act, it must appear that he did not desert in time of war, or while it was flagrant. A soldier who deserts in time of war, although he may be far distant from the scene of hostilities, in fact deserts in the face of an enemy, because he is liable to be called upon to confront the enemy at any moment. The words "in the face of an enemy" ought not to be taken literally, and held to mean that the soldier, when he deserts, must be in the immediate presence of an opposing force. If he is a long distance away, but war is at the time flagrant, and he is liable to be called upon at any moment to be sent forward and to confront an enemy, his desertion under such circumstances, in my judgment, takes place "in the face of an enemy," within the contemplation of the act of congress, and is a grave offense, and one who deserts under such circumstances is not entitled to the benefit of the statute. On the state of facts developed in the present case, it cannot be fairly said, I think, that Cadwallader deserted in time of war and in the face of an enemy, and that he is, therefore, not entitled to the benefit of the statute. His desertion took place after peace had been attained, and war was practically at an end. Such was the understanding of the public, and the theory upon which both of the belligerent nations acted. This much is said because the questions aforesaid were discussed before me in argument.

While I entertain the foregoing views, I am of the opinion that an order discharging the petitioner ought not to be made at the present time by the civil authorities. The petitioner has never as yet been discharged from the service, and, as he has not been discharged, he is subject to the jurisdiction of a military tribunal. The fact that he may plead the statute of limitations as a defense to a prosecution for desertion is not suffi-

cient, in my judgment, to warrant a civil court in interfering with a prosecution for the offense before a military tribunal before that court has acted upon the case and decided it. The military court, in my opinion, has jurisdiction of the person of the petitioner, he never having been discharged from the army, and the power to determine whether the plea of limitation which he interposes is a good and sufficient defense. For this reason—that is to say, because the military court has jurisdiction over the person of the petitioner, and the power to determine whether the prosecution is barred by limitation—I decline to interfere at this time, and direct that the writ be discharged.

Writ discharged.

NOTE.—*The Offense of Desertion in the Military or Naval Service.*—By some early English statutes, which appear to have been in force down to the Revolution of 1688, desertion was made a felony, punishable in the civil courts. But these statutes fell into disuse after Parliament by the Mutiny Acts for the first time authorized mutiny and desertion to be punished at the sentence of a court martial in time of peace. In this country from the very year of the Declaration of Independence, congress has dealt with desertion as exclusively a military crime, triable and punishable, in time of peace, as well as in time of war, by court martial only, and not by the civil tribunals; the only qualification being that since 1830 the punishment of death cannot be awarded in time of peace. Article 47 of the Rules and Articles governing the armies of the United States (§ 1342, Rev. Stat.), provides that any officer or soldier who deserts the service of the United States "shall, in time of war, suffer death, or such other punishment as a court martial may direct; and in time of peace, any punishment excepting death, which a court martial may direct."

The first rule therefore to which our attention is naturally attracted, is that desertion being an offense cognizable only by a court martial, a police officer of a state, or a private citizen has no authority as such, without any warrant or military order, to arrest and detain a deserter from the army of the United States, *Kurtz v. Moffett*, 115 U. S. 501. So also, it will be observed that the fifth article of amendment of the constitution, which declares that "no person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury" expressly excepts "cases arising in the land and naval forces." Conviction for desertion, therefore, or any other crime, cognizable only by courts martial, cannot be controlled or revised by the civil courts. *Dynes v. Hoover*, 20 How. (U. S.) 65; *Ex parte Mason*, 105 U. S. 696; *Wales v. Whitney*, 114 U. S. 564.

Another rule to be observed is that a person whose enlistment is void, cannot commit the crime of desertion. *In re Davison*, 21 Fed. Rep. 618; *In re Baker*, 23 Fed. Rep. 30. Therefore, minors below the age of 16 but not those between 16 and 21 who enlist in the army, either by misrepresentation or otherwise cannot be guilty of desertion. Sec. 1116 of the Revised Statutes provides that "recruits enlisting in the army must be effective and able bodied men, and between the ages of 16 and 35 years at the time of their enlistment. Sec. 1117 provides that minors between 16 and 21 may enlist only with the consent of their parents or guardians, if they have any. Sec. 1118 provides that "no minor under the age of 16 years shall be enlisted

or mustered into the military service." The reasonable conclusion warranted by these sections would seem to be that the contract of enlistment of a minor under 16 is absolutely void; but if he is over the age of 16 it is valid as to him but voidable during the period of minority at the election of his parents or guardian. It is, therefore, well settled by authority that a minor between the ages of 16 and 21 may be guilty of desertion. *In re Morrissey*, 137 U. S. 157; *Solomon v. Davenport*, 87 Fed. Rep. 318; *In re Zimmerman*, 30 Fed. Rep. 176; *In re Kaufman*, 41 Fed. Rep. 876; *In re Wall*, 8 Fed. Rep. 85; *In re Cosenow*, 37 Fed. Rep. 668; *In re Dowd*, 90 Fed. Rep. 718. The only case laying down a contrary rule is that of *United States v. Hanchett*, 28 Fed. Rep. 26, where it was held that where a minor between 16 and 21 enlists without the consent of his parents or guardian, and three days thereafter, before being assigned to military duty, leaves the recruiting station, such act will be construed as a mere disaffirmance of the illegal contract of enlistment, and not as a criminal desertion. *United States v. Hanchett*, 18 Fed. Rep. 26. In answer to this argument, Justice Brewer, in the case of *In re Morrissey*, says: "The age at which an infant shall be competent to do any acts or perform any duties, military or civil, depends wholly upon the legislature. Congress has declared that minors of the age of 16 are capable of entering the military service, and undertaking and performing its duties. An enlistment is not a contract only, but effects a change of status. It is not, therefore, like an ordinary contract, voidable by the infant."

In the case of *Ex parte Reeves*, 121 Fed. Rep. 848, it was held that Rev. St. § 1419, as amended by Act Feb. 23, 1881, which provides that "minors between the ages of 14 and 18 years shall not be enlisted for the naval service without the consent of their parents or guardians," declares a public policy, and the enlistment of a minor under the age of 18 without the consent of his father is void from the beginning as against the father, and gives the minor no status in the naval service which can be asserted by the United States to deprive the father of the custody and control of his son after he has regained the same, or which renders the son punishable by court martial for desertion in peaceably leaving his ship and returning to his father with the latter's approval. *Ex parte Reeves*, 121 Fed. Rep. 848.

But even in case the enlistment is void, the deserter does not always escape punishment. Thus, a recruit, who was enlisted on his representation that he was only 28 years of age, is estopped, on his trial for desertion, to plead that he was never properly enlisted because he, in fact, was over 35 years of age, the limit of age for enlistment, and, hence, that he was not amenable to court martial. *United States v. Grimley*, 137 U. S. 147, reversing *In re Grimley*, 38 Fed. Rep. 84. So, also, in a similar case where petitioner pleaded and brought evidence to prove that he was under the age of 16 at the time of his enlistment, the court held this not to be sufficient to establish that fact against the sworn statement of the petitioner and the record in the family bible. *In re Lawler*, 40 Fed. Rep. 233.

It has also been held that a valid conviction for attempting to desert may be had upon a charge of desertion. *Dynes v. Hoover*, 20 How. (U. S.) 79.

JETSAM AND FLOTSAM.

THE PROTECTION OF NON-UNION WORKMEN AGAINST AGGRESSIVE COMBINATIONS.

We referred shortly to *Giblan v. National Amalgamated Laborer's Union* at the time when the decision was given, but the publication of the full report of the decision of the court of appeal (1903, 2 K. B. 600) may usefully be made the occasion for recurring to a subject which recent litigation has shown to be of exceptional interest and also of exceptional difficulty. Until the question of the extent to which peaceful coercion can be carried in labor disputes comes again before the House of Lords the answer to it depends upon the deductions to be drawn from the decisions of that tribunal in the *Mogul* case (1892, A. C. 25), in *Allen v. Flood* (1898, A. C. 1), and in *Quinn v. Leatham* (1901, A. C. 495). The result of the first case was that a combination among traders to offer such facilities to customers as would attract the whole trade to themselves and ruin their rivals was not actionable. "The whole matter," said Lord Halsbury, C., "comes round to the original proposition, whether a combination to trade, and to offer, in respect of prices, discounts and other trade facilities, such terms as will win so large an amount of custom as to make it unprofitable for rival traders to pursue the same trade is unlawful, and I am clearly of opinion that it is not." In other words, every trader is entitled not only to seek his own advantage by trading upon terms which will injure his rivals, but he may also combine with others for the same purpose. The right of his rivals to trade is, as it was put by Fry, L. J., in the *Mogul* case (23 Q. B. D. p. 25), not an absolute, but a qualified right—a right conditioned by the like right in all other persons, and a right, therefore, to trade subject to competition. This dictum was referred to by Stirling, L. J., in his judgment in *Giblan's case supra*, and he stated the analogous position of workmen in the following terms: "So also every workman is entitled to dispose of his labor on his own terms; but that right is conditioned by the right of every other workman to do the like. In particular each employee is, as I think, at liberty to decide for himself whether he will or will not work along with another individual in the same employ; and if all the workmen but one determine that they will not continue their labor in company with that one, they may inform their employer of their decision."

So far we are taken by the *Mogul* case. Then came *Allen v. Flood*, which, until a different complexion was put upon it by *Quinn v. Leatham*, seemed to establish the workmen's right of combination upon a still firmer basis. To show what was at the time thought to be the effect of *Allen v. Flood* it is permissible to refer to the statement of the case contained in the head-note to the report in the *Law Reports*. This, after stating that a trade union delegate had informed the employers that all his men would be called out unless certain obnoxious workmen (the respondents) were dismissed, continues: "There was evidence that this was done to punish the respondents for what they had done in the past. The employers, in fear of this threat being carried out, which (as they knew) would have stopped their business, discharged the respondents and refused to employ them again." There was thus, according to the apparent result of the facts, an intention to punish the respondents, and their dismissal was procured by a threat uttered to the employers by the trade union official. The permanent authority of the case must be

considered now to lie in the decision that the malicious motive implied in the intention to punish did not in itself make the conduct of the trade union official actionable, assuming it to be otherwise lawful. This result has not been questioned. But the House of Lords also went on to hold, by a majority, that the conduct in question was in itself lawful. When, however, the same matter came up for discussion again in *Quinn v. Leatham*, very careful attention was given to discovering exactly what was the conduct which the house had thus held to be lawful, and it was considered that there had been in fact no threat uttered by the delegate, but simply a statement of what the men had resolved to do. "The hypothesis of fact," said Lord Halsbury, C., "upon which *Allen v. Flood* was decided by a majority in this house was that the defendant there neither uttered nor carried into effect any threat at all; he simply warned the plaintiffs' employers of what the men themselves, without his persuasion or influence, had determined to do." And similarly, Lord Lindley said: "In the opinion of the noble lords who formed the majority of your lordships' house, all that *Allen* did was to inform the employers of the plaintiffs that most of their workmen would leave them if they did not discharge the plaintiffs." This reduced the position of the defendant to that of a mere intermediary. The men were going to leave and this was averted by a statement to the employers. As the result, the plaintiffs were dismissed, but they had no right of action. Nothing had happened which constituted any infringement of their rights.

Allen v. Flood being thus put out of the way, it was comparatively easy to restore to the individual workman, as against the organized power of the trade union, a position which he had seemed to have lost, and this was done by *Quinn v. Leatham*. The combination of workmen is perfectly legitimate so long as it does not take the form of an attack on the right of the individual workman. Each party, the individual workman on the one side, and the combination of workmen on the other, are entitled to the enjoyment of their right to dispose of their labor as they please, subject only to the exercise of this right by the opposite party. But when the combination departs from this quiescent attitude and aggressively interferes with the individual workman by threats uttered to the employer, then the right of the individual workman is invaded, and, if damage follows, he has a right of action.

This, it is submitted, is the effect of *Quinn v. Leatham*, and upon this view of the law the result in *Giblan's case* presented no great difficulty. Upon the facts found by the jury, two trade union officials had combined to prevent the plaintiff from obtaining employment by threatening to call out the other workmen. The plaintiff had been a local treasurer of the union, and was indebted in respect of union funds, and the object was to make him pay his debt, and, in the case of one of the defendants, to punish him for his defalcations. But, in accordance with the decision in *Allen v. Flood*, the motive was perhaps not material, and at any rate it was held that it did not afford any justification for the interference with the plaintiffs' rights. In respect of the defalcations the union had their remedy at law, and were not entitled to impose the punishment of depriving the plaintiff of his employment. There had been, therefore, an aggressive use by the defendants of their powers as trade union officials, and this constituted an actionable interference with the plaintiff's right to dispose of his own labor as he pleased. It should also be noted that *Romer, L. J.*, although his judgment was based upon the combina-

tion between the defendants, disclaimed the idea that combination was an essential element of liability in such a case. The action lies for the unjustifiable interference with a man's liberty of action, and this interference may be due to the conduct of an individual who is placed in a position of special power as well as to a combination of individuals. It may be said that Giblan's case points the moral of Quinn v. Leathem, and secures to the individual workman a reasonable measure of protection.—*Solicitor's Journal*.

CORRESPONDENCE.

"REGULATING" THE GIVING OF TRADING STAMPS.

To the Editor of the Central Law Journal:

We have noted with interest your article of November 27, on the subject of trading stamps and prohibitory legislation.

It may be said that prohibitory legislation has run its course since California, Louisiana, Massachusetts, New York, Pennsylvania, Ohio and Rhode Island and other states have declared conclusively against it. A new phase of the situation is now claiming our attention, to-wit, regulation of our business by laws which are an indirect prohibition. It is clear that unless the business interferes with the public health, the public safety, or the public morals, it cannot be regulated any more than prohibited.

Since you appear to be interested in the question, we venture to suggest that, as you say, this power of regulation, "like charity, is often used as cloak for a commission of a multitude of sins."

Sincerely,

THE SPERRY & HUTCHINSON CO.
New York, N. Y. J. H. J.

BOOKS RECEIVED.

A Compilation of Warehouse Laws and Decisions, containing the statutes of each of the states and territories pertaining to warehousemen, together with a digest of the decisions of the state and federal courts, in all cases affecting warehousemen. With an Analytical Index. By Barry Mohun, LL.M., of the Bar of the District of Columbia and of the State of New York. The Banks Law Publishing Company, 21 Murray Street, New York, 1904. Sheep, pp. 947. Price \$6.00. Review will follow.

Chancery Practice, with Especial Reference to the Office and Duties of Masters in Chancery, Registers, Auditors, Commissioners in Chancery, Court Commissioners, Master Commissioners, Referees, etc., including forms of orders of reference, masters' reports, objections, exceptions, orders of confirmation, recommitment, etc. By John G. Henderson, LL.D., of the Chicago Bar. Chicago, T. H. Flood and Company, 1904. Sheep, pp. 1,200. Price, \$6.40. Review will follow.

The Conveyance of Estates in Fee by Deed, being a statement of the principles of law involved in the drafting and interpretation of deeds of conveyance and in the examination of title to real property. By James H. Brewster. Indianapolis, The Bobbs-Merrill Company, Publishers. Sheep, pp. 684. Price, \$5.00. Review will follow.

HUMOR OF THE LAW.

Chief Justice Story attended a public dinner in Boston at which Edward Everett was present. Desiring to pay a delicate compliment to the latter, the learned judge proposed as a volunteer toast:

"Fame follows merit where Everett goes."

The brilliant scholar arose and responded:

"To whatever heights judicial learning may attain in this country, it will never get above one Story."

There is a tradition that an Irish individual, named and entitled Hon. Dennis Quinn, used to dispense justice in the brown stone building at the corner of Center and Chambers street, New York. In an action for breach of a contract of sale, it was meritoriously set up for the defendant that the case fell within the statute of frauds. "But," explained Dennis, "there is no fraud in this case." "Permit me," replies the counsel, "to quote the statute," and he proceeded to do so. "Yis," rejoined Dennis, "imported, as I have been given to understand, into our statute books from England, and calculated to disturb and shatter all confidence between man and man, as if a man couldn't make a lawful bargain, if, owing to the poverty of his parents, he hadn't learned to write. Sor, I overrule the statute of frauds. Niver plead it again in this court if you expect to be heard."

WEEKLY DIGEST.

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1. ACCIDENT INSURANCE—Repugnancy of Policy Provisions.—A clause of an accident policy excluding disability from disease contracted 15 days from the date of the policy held void, as repugnant to a previous provision purporting to insure complainant from the date of the policy.—*Bean v. Etna Life Ins. Co., Tenn.*, 78 S. W. Rep. 104.

2. ACKNOWLEDGMENT—Validity.—A certificate of acknowledgment, made by a notary public who has accepted the office of judge of a criminal court, is valid.—*Old Dominion Building & Loan Ass'n v. Sohn, W. Va.*, 46 S. E. Rep. 222.

3. ACTION—Joinder of Causes.—A suit to foreclose a chattel mortgage may be joined with an action for the conversion of the mortgaged property.—*Cassidy v. Willis & Connally, Tex.*, 78 S. W. Rep. 40.

4. ACTION—Worthlessness of Prospective Judgment No Defense.—That a prospective judgment against defendant in an action at law will be worthless is no defense.—*Kimber v. Gunnell Gold Min. & Mill. Co., U. S. C. C. of App., Eighth Circuit, 126 Fed. Rep. 137.*

5. ADVERSE POSSESSION—Casual Acts of Possession.—Casual acts, such as occasionally driving cows into a tract of woodland and carrying off a fallen tree to burn as firewood, are not evidence of adverse occupation sufficient to put the record owner of the title or the world in general upon notice that their land was being claimed or used adversely to them.—*Johnson v. Thomas, Dist. of Col. App., 32 Wash. Law Rep. 69.*

6. ADVERSE POSSESSION—Joint Occupation.—Mere occupancy by donor of tract of land with donee held not to preclude latter from recovering title by adverse possession.—*Owsley v. Owsley, Ky., 77 S. W. Rep. 397.*

7. ADVERSE POSSESSION—Land Owned by County.—No title by adverse possession can be acquired of land owned by a county and used for public use.—*Foley v. Doddridge County Court, W. Va., 46 S. E. Rep. 246.*

8. APPEAL AND ERROR—Excessive Verdict.—The objection that a verdict is excessive cannot be considered on appeal, unless it is made a ground for a new trial.—*Turney v. Baker, Mo., 77 S. W. Rep. 479.*

9. APPEAL AND ERROR—Refusal to Allow Witness to Answer Question.—Refusal to allow a witness to answer a question will not be reviewed, where it is not shown what it was expected the answer would be.—*Thomas v. Wheeling Electrical Co., W. Va., 46 S. E. Rep. 217.*

10. APPEAL AND ERROR—Rehearing Denied Where Correct Conclusion has Been Reached.—If a correct conclusion has been reached, even by a wrong course of reasoning, the unsuccessful party is not entitled to a rehearing.—*Schoel Dist. of Omaha v. McDonald, Neb., 97 N. W. Rep. 584.*

11. APPEARANCE—Non-Resident.—A non-resident, who appears to an action against him in the state and files pleadings therein, subjects himself to the jurisdiction.—*Cassidy v. Willis & Connally, Tex., 78 S. W. Rep. 40.*

12. BENEFIT SOCIETIES—Prompt Payment of Dues.—A clerk's custom of accepting overdue dues from members in good health held no waiver of prompt payment.—*Smith v. Sovereign Camp of Woodmen of the World, Mo., 77 S. W. Rep. 862.*

13. BILLS AND NOTES—Bona Fide Holder of Check Given for Gambling Debt.—A bona fide holder for value of a negotiable instrument, not void, takes the same free from all equities existing between the parties of which he has notice.—*H. O. Hurlburt & Sons v. Straub, W. Va., 46 S. E. Rep. 163.*

14. BURGLARY—Evidence as to Condition of House.—In a prosecution for burglary, evidence as to condition of house immediately after the burglary held admissible.—*Washington v. State, Tex., 77 S. W. Rep. 810.*

15. CANCELLATION OF INSTRUMENTS—Jurisdiction of Equity.—Equity will take jurisdiction of a bill filed by the heirs of a father to cancel a conveyance to his children for failure on the part of the grantees to comply with the conditions of the conveyance.—*Fluharty v. Fluharty, W. Va., 46 S. E. Rep. 139.*

16. CARRIERS—Duty of Carrier to Passenger in Freight Train.—A carrier held not relieved from exercising the utmost care in the operation of a freight train for the safety of a passenger thereon.—*Hardin v. Ft. Worth & D. C. Ry. Co., Tex., 77 S. W. Rep. 431.*

17. CARRIERS—Failure to Prove Defendant Controlled and Operated Road.—Where a non-suit was granted for failure of proof, a new trial will not be granted on the statement of plaintiff's counsel that he believed he would be able to furnish such proof.—*Boiakosky v. Philadelphia & R. Ry. Co., U. S. C. C., E. D. Pa., 126 Fed. Rep. 230.*

18. CARRIERS—Injuries From Exposure.—In an action for injuries to a passenger from exposure from being compelled to walk back to her station, evidence as to her condition of health, and that she was unprotected

with sufficient clothing to withstand the weather, held admissible.—*Pecos & N. T. Ry. Co. v. Williams, Tex., 78 S. W. Rep. 5.*

19. CARRIERS—Injuries While Alighting.—A passenger, who leaves his seat and goes to the door of the coach as the train is slowing up to stop at his station, but before it has become stationary, is not negligent *per se*.—*Chesapeake & O. Ry. Co. v. Topping, Ky., 78 S. W. Rep. 135.*

20. CARRIERS—Injuries While Alighting.—Where plaintiff's theory was that a car had stopped, she cannot complain of instructions that, if it had not stopped, defendant was not liable.—*Peck v. St. Louis Transit Co., Mo., 77 S. W. Rep. 736.*

21. CARRIERS—Postal Clerks as Passengers.—Except under exceptional circumstances, and with due regard to the duties he is required to perform, a postal clerk upon a railroad train is as much a passenger and entitled to all the rights and immunities of passengers as any person on the train transported under the ordinary contract for hire.—*Chesapeake & Ohio E. R. Co. v. Patton Dist. of Colo. App., 32 Wash. Law Rep. 85.*

22. CARRIERS—Refusal to Deliver Freight to Pledgee of Bill of Lading.—Refusal of carrier to deliver goods to pledgee of bill of lading, except on surrender of that instrument, held conversion.—*First Nat. Bank v. San Antonio & A. P. R. Co., Tex., 77 S. W. Rep. 410.*

23. CONSPIRACY—Fraudulent Homestead Entry.—An indictment for conspiracy to defraud the government of land by a fraudulent homestead entry held not objectionable for failure to specifically describe the land affected.—*United States v. McKinley, U. S. C. C., D. Oreg., 129 Fed. Rep. 242.*

24. CONSTITUTIONAL LAW—Anti-Weed Ordinance.—An anti-weed ordinance held not violative of Const. art. 2, § 4, relating to one's right to the gains of his own industry.—*City of St. Louis v. Galt, Mo., 77 S. W. Rep. 876.*

25. CONSTITUTIONAL LAW—Discrimination Against Negro Race.—A motion to quash an indictment against a negro because of the discrimination against the negro race in the formation of the grand jury held properly denied.—*Thompson v. State, Tex., 77 S. W. Rep. 449.*

26. CONSTITUTIONAL LAW—Right of Appeal.—Allowing appeals and writs of error in some cases permits the remedy for every wrong which the law gives to be further pursued in them than in those as to which such provisions are not made.—*Fleshman v. McWhorter, W. Va., 46 S. E. Rep. 116.*

27. CONSTITUTIONAL LAW—Seizures of Imported Tea.—An importer of tea seized held not estopped to contend that the statute authorizing such seizure was unconstitutional by reason of his having given a bond on a former seizure of the tea to carry the same out of the country and not reimpart it.—*United States v. Seven Packages of Tea, U. S. D. C. E. D. N. Y., 126 Fed. Rep. 224.*

28. CONTEMPT—Admission of Charges.—Where an information charges defendant with contempt of court, and he stands mute, it is as an admission of the charges in the information.—*Toozer v. State, Neb., 97 N. W. Rep. 584.*

29. CONTEMPT—Unfairness in Summoning Talesman.—The fact that a marshal knew a talesman, whom he subpoenaed under an open venire, to be a friend of the defendant in a criminal case, is not evidence of a willful contempt of court.—*Richards v. United States, U. S. C. C. of App., Ninth Circuit, 126 Fed. Rep. 105.*

30. CONTRACTS—Liability of Reinsurer of Fire Policy.—Where defendant assumed all the policies of another insurance company by which plaintiff was insured, plaintiff held entitled to sue defendant in his own name to recover a loss for which defendant was liable under such contract of assumption.—*Ruohs v. Traders' Fire Ins. Co., Tenn., 78 S. W. Rep. 85.*

31. CORPORATIONS—Appointment of Receiver.—An order appointing a receiver for a corporation, in an action where such relief is the only relief sought, will be

plain Lack of Medical Aid.—In an action for injuries to a passenger, evidence that plaintiff and her father were too poor to employ a physician held competent to exonerate for want of authority in such court to make the order.—*Mann v. German-American Inv. Co.*, Neb., 97 N. W. Rep. 600.

32. CORPORATIONS—Appointment of Receivers.—A court of equity has power independently of statute to appoint a receiver for an insolvent corporation at suit of its mortgage bondholders and stockholders, where the bill alleges that the insolvency was produced by the gross mismanagement of its directors, who are also charged with positive misconduct amounting to a breach of trust.—*United States Shipbuilding Co. v. Conklin*, U. S. C. C. of App., Third Circuit, 126 Fed. Rep. 132.

33. CORPORATIONS—Assignment Attacked by Creditors.—Creditors held not entitled to have corporation's assignment for benefit of creditors set aside for defects in notices of meetings of stockholders and directors.—*State Nat. Bank v. Duncan*, Miss., 35 So. Rep. 569.

34. CORPORATIONS—Breach of Trust by Officers.—A contract made by officials of an existing corporation with a new corporation, in which they have a controlling interest, without the knowledge of the directors of the existing corporation, held subject to annulment by equity.—*Attalla Iron Ore Co. v. Virginia Iron, Coal & Coke Co.*, Tenn., 77 S. W. Rep. 774.

35. CORPORATIONS—Jurisdiction of Court Over Cause of Action.—The courts of the state have jurisdiction of a cause of action in favor of a non-resident plaintiff against a corporation doing business in the state.—*Western Union Tel. Co. v. Shaw*, Tex., 77 S. W. Rep. 433.

36. CORPORATIONS—Mortgaged Property.—Purchaser of mortgaged property held entitled on foreclosure to compensation for betterments which may be removed without injuring freehold.—*Georgetown Water Co. v. Fidelity Trust & Safety Vault Co.*, Ky., 78 S. W. Rep. 113.

37. COURTS—Division of State Courts.—A decision as to the constitutionality of a state statute dividing the state supreme court into divisions, decided by all of the justices of such court sitting *in banc*, held conclusive on the federal courts.—*Williams v. Stearns*, U. S. C. C., D. R. I., 126 Fed. Rep. 211.

38. COURTS—Jurisdiction by Consent.—Jurisdiction over subject-matter cannot be obtained by consent.—*Mercer v. Wood*, Tex., 78 S. W. Rep. 15.

39. CRIMINAL EVIDENCE—Showing Lawlessness in Community.—In prosecution for manslaughter, state's cross-examination as to lawlessness in community and circumstances under which defendant's brother was shot held harmless error.—*Montgomery v. State*, Tex., 77 S. W. Rep. 789.

40. CRIMINAL LAW—Filing New Information.—The filing of a new information, after loss of the original, without attempt at substitution, held the commencement of a new case, entitling defendant to two days' service.—*Stapp v. State*, Tex., 77 S. W. Rep. 757.

41. CRIMINAL LAW—Former Jeopardy.—An acquittal under an indictment charging larceny of the property of T is no bar to a prosecution for larceny of the same property, alleged to belong to M.—*Supp v. State*, Tex., 77 S. W. Rep. 456.

42. CRIMINAL LAW—Res Gestæ.—In a prosecution for homicide, certain statements of defendant held not admissible as a part of the *res gestæ*.—*Davis v. Commonwealth*, Ky., 77 S. W. Rep. 1101.

43. DESCENT AND DISTRIBUTION—Action for Share of Deceased Partner.—Heirs of a deceased partner held not entitled to sue for his share of an unadministered asset of the partnership.—*Pullis v. Pullis*, Mo., 77 S. W. Rep. 753.

44. DESCENT AND DISTRIBUTION—Advancements.—Sums advanced by a parent to his son cannot be consid-

ered as technical "advancements," so long as the son is alive.—*Owsley v. Owsley*, Ky., 77 S. W. Rep. 394.

45. DEPOSITIONS—Short Notice as Evidence of Bad Faith.—The giving of very short notice by those taking depositions held not conclusive evidence of bad faith on their part, so as to invalidate the proceedings.—*In re Wogan*, Mo., 77 S. W. Rep. 490.

46. DIVORCE—Meaning of "Separation from Bed and Board."—The terms "legal separation from bed and board," as employed in the second proviso of section 966, Code D. C., providing that legal separation from bed and board may be granted for drunkenness, cruelty, or desertion, are synonymous with divorce *a mensa et thoro*.—*Maschauer v. Maschauer*, Dist. of Col. App., 32 Wash. Law Rep. 66.

47. DRAINS—Diversion of Sewage.—Purchasers of said lots, could not recover as for a nuisance against the District of Columbia for allowing sewage to flow through sewers established at the time of their purchase, nor for the subsequent diversion of the sewage to a different point of discharge.—*District of Columbia v. Cropley*, Dist. of Col. App., 32 Wash. Law Rep. 97.

48. ELECTIONS—Necessity for Written Notice in Contest.—Actual notice to one of defendants in contested local option 'lection of grounds of contest held not to dispense with necessity for serving written notice required by statute to confer jurisdiction.—*Mercer v. Woods*, Tex., 78 S. W. Rep. 15.

49. EQUITY—Appointment of Receiver.—A prayer for general relief, accompanied with one for the appointment of a receiver only, held a prayer for relief other than such appointment.—*Mann v. German-American Inv. Co.*, Neb., 97 N. W. Rep. 600.

50. ESTOPPEL—Community Property.—Though a husband be estopped from denying that property purchased during the marriage belongs to his wife, his children, being forced heirs, can show the actual facts of the case by parol evidence.—*Westmore v. Harz*, La., 35 So. Rep. 578.

51. EQUITY—Suit to Set Aside Decree.—An original bill to set aside a decree cannot be maintained on the ground of irregularities and errors which might have been corrected on appeal or by a bill of review.—*Cocke v. Copenhagen*, U. S. C. C. of App., Fourth Circuit, 126 Fed. Rep. 145.

52. EVIDENCE—Contract of Employment.—A letter from defendant's manager, accepting plaintiff's offer of work, held properly admitted in evidence.—*Orange Rice Mill Co. v. McIlhinney*, Tex., 77 S. W. Rep. 428.

53. EVIDENCE—Conversations With Decedent.—Conversations or admissions of a decedent cannot be proven by the wife of a defendant, whose interests in the action were adverse to those of other defendants.—*Cady v. Cady*, Minn., 97 N. W. Rep. 580.

54. EVIDENCE—Loss of Memorandum.—The loss of a memorandum kept by the secretary of a meeting is sufficient to authorize secondary evidence of its transactions.—*Morey v. Clopton*, Mo., 77 S. W. Rep. 467.

55. EVIDENCE—Opinion of Section Foreman.—An experienced section foreman's testimony that, if his signal had been observed, the hand car would have been stopped and accident averted, held admissible.—*Galloway v. San Antonio & G. Ry. Co.*, Tex., 78 S. W. Rep. 32.

56. EVIDENCE—Photographs Showing Repair of Sidewalks.—Photographs taken after repair of sidewalk, after an injury, showing cement patch, held admissible to show extent of hole which caused injury.—*City of San Antonio v. Talerico*, Tex., 78 S. W. Rep. 28.

57. EVIDENCE—Presumption as to Sameness of Laws.—On an issue as to whether lands in Arkansas had been deeded absolutely, or whether the conveyance was intended to create a trust, it was to be presumed that the law of Arkansas was the same as that of Texas.—*Boyd v. Boyd*, Tex., 78 S. W. Rep. 39.

58. EVIDENCE—Proof of Poverty Competent to Ex-

plain why a physician had not been employed.—*Pecos & N. T. Ry. Co. v. Williams, Tex.*, 78 S. W. Rep. 5.

59. EXECUTORS AND ADMINISTRATORS—Liability of Distributees.—In a suit by an administrator for contribution from distributees to pay a debt which he has been compelled to pay after distribution, any property belonging to the distributees, liable for the debts generally, may be subjected.—*McClung v. Sieg, W. Va.*, 46 S. E. Rep. 210.

60. EXEMPTIONS—Married Women.—Under Rev. St. 1899, sec. 4335, a married woman may claim any exemption, except where her husband has claimed it for the protection of his own property.—*White v. Smith, Mo.*, 78 S. W. Rep. 51.

61. FIRE INSURANCE—Negligence in Not Storing Books in Safe.—A person held guilty of negligence who, by his failure to store them in a safe, permitted a set of books required by his fire insurance policy to be burned.—*Rives v. Fire Ass'n of Philadelphia, Tex.*, 77 S. W. Rep. 424.

62. FRAUDS, STATUTE OF—Contemporaneous Parol Agreement.—Where a deed reserved a life estate in the grantor, a contemporaneous parol agreement that such life estate was solely to secure the grantee's agreement to support the grantor could not be proved.—*Hall v. Small, Mo.*, 77 S. W. Rep. 738.

63. FRAUDS, STATUTE OF—Real Estate Agent.—The statute of frauds does not require the agent to be authorized in writing to sign a contract of purchase of land.—*Ober v. Stephens, W. Va.*, 46 S. E. Rep. 195.

64. FRAUDULENT CONVEYANCES—Evidences of Fraudulent Intent.—Where, after an absolute conveyance by a debtor in failing circumstances, he remains in possession without accounting for its use, these facts are evidence of fraudulent intent.—*Timms v. Timms, W. Va.*, 46 S. E. Rep. 141.

65. GAMING—Invalidity of Check Given in Payment.—A check payable to the winner in a gaming transaction is void, even as to an innocent holder for value, unless the maker has induced the purchase thereof by promising payment.—*H. O. Hurlburt & Sons v. Straub, W. Va.*, 46 S. E. Rep. 163.

66. GUARDIAN AND WARD—Final Settlement.—A curator was properly allowed an attorney's fee of \$25 for defending his final settlement against the ward's exceptions.—*Clopton v. Simonds, Mo.*, 77 S. W. Rep. 467.

67. GUARDIAN AND WARD—Liability for Necessaries.—A guardian cannot be sued for necessities for his ward, unless he has expressly agreed to pay for the same.—*Pinnell v. Hinkle, W. Va.*, 46 S. E. Rep. 71.

68. HABEAS CORPUS—Exclusion of Anarchist.—A decision of the immigration board of special inquiry that an immigrant is an anarchist is not open to review by the court in *habeas corpus* proceedings.—*United States v. Williams, U. S. C. C. S. D. N. Y.*, 126 Fed. Rep. 253.

69. HIGHWAYS—Right to Complain of Obstruction as a Public Nuisance.—A private individual, who is injured by the obstruction of a highway, cannot, by a suit on behalf of himself and others similarly situated, enjoin the obstruction as a public nuisance.—*Wees v. Coal & Iron Ry. Co., W. Va.*, 46 S. E. Rep. 166.

70. HOMICIDE—Evidence that Deceased was Prevented from Making Statement.—Where defendant, in a prosecution for murder, was indicted as a principal, evidence that, after deceased was shot, defendant made hypodermic injections to prevent deceased from making any statement about the killing, was inadmissible.—*Harper v. State, Miss.*, 85 So. Rep. 572.

71. HOMICIDE—Instructions Where Evidence is Entirely Circumstantial.—Where evidence of a murder was entirely circumstantial, the court properly instructed the jury on every phase of the law regarding homicide.—*Williams v. Commonwealth, Ky.*, 78 S. W. Rep. 134.

72. HOMICIDE—Killing Wrong Person.—Where A kills B, intending to kill C, he is guilty of murder in the second degree, provided the killing would have been murder in the first or second degree, had C been killed.—*Sparks v. State, Tex.*, 77 S. W. Rep. 511.

73. HOMICIDE—Previous Disease the Cause of Death.—Where defendant claimed that deceased died from disease, and not as the result of a wound inflicted on him by defendant, it was the duty of the court to charge the law specifically as applied to such contention.—*Garner v. State, Tex.*, 77 S. W. Rep. 797.

74. HOMICIDE—Resisting Arrest.—One held entitled to resist an arrest made in a threatening and menacing manner to the extent of taking life, if necessary to save life.—*Vann v. State, Tex.*, 77 S. W. Rep. 813.

75. HUSBAND AND WIFE—Antenuptial Contract.—Under an antenuptial agreement, held, that the woman could incur or sell her property, and that any remaining at her death was subject to her debts.—*Stevenson v. Renard, Miss.*, 35 So. Rep. 576.

76. HUSBAND AND WIFE—Contract of Sale.—A payment, which is to bind a bargain and to be deposited with a contract in a bank until a conveyance is made, on payment in full by a certain date, held in time.—*Johnson v. Weber, Neb.*, 97 N. W. Rep. 555.

77. INJUNCTION—Destruction of Property.—Injunction will not lie to compel a railroad company to restore a crossing, where plaintiffs have an adequate remedy at law.—*Louisville & N. R. Co. v. Smith, Ky.*, 78 S. W. Rep. 160.

78. INTOXICATING LIQUORS—Validity of License Determined by *Certiorari*.—There is no equity for injunction against maintenance of dramshop, when validity of license is determinable by *certiorari*, and excise commissioner's findings are otherwise conclusive.—*Cooper v. Hunt, Mo.*, 77 S. W. Rep. 483.

79. INTOXICATING LIQUORS—Violation of Local Option Law.—To authorize a conviction of violation of the local option law, it must be shown that local option was in force at the time and place of the acts complained of.—*Watkins v. State, Tex.*, 77 S. W. Rep. 799.

80. JOINT INTEREST—Power of Majority to Apportion Lots Bought.—Majority of vendees of land, who were to apportion the several lots bought, held not required to give individual vendees notice of its meetings.—*Morey v. Clopton, Mo.*, 77 S. W. Rep. 467.

81. LANDLORD AND TENANT—Elements of Damage in Breach of Lease.—A lessee of property to be used as a saloon, on breach of the lease, held not entitled to recover an advancement made to a person to be employed in the saloon, to be repaid in services.—*Gross v. Heckert, Wis.*, 97 N. W. Rep. 952.

82. LANDLORD AND TENANT—Open Cellar Door.—A landlord held not liable for injuries sustained by one by falling into the open doorway in the sidewalk in front of the premises, unless the door and its use was *per se* a nuisance.—*Fehlauer v. City of St. Louis, Mo.*, 77 S. W. Rep. 843.

83. LANDLORD AND TENANT—Ratification by Landlord of Subletting Premises.—Where an owner of land rents it to a tenant, and the latter sublets it, and the landlord treats the subtenant as his own, he cannot disavow for more than the contract price agreed upon between himself and the original tenant.—*Fountain v. Whitehead, Ga.*, 46 S. E. Rep. 104.

84. LANDLORD AND TENANT—What Constitutes a Surrender.—A surrender of demised premises, accepted by the lessor, ends the relation of landlord and tenant; and, when the surrender is between rent days, the tenant is discharged from all liability for rent even for the period between the surrender and the last rent day, for the rent is not to be apportioned.—*Okie v. Person, Dist. of Col. App.*, 82 Wash. Law Rep. 103.

85. LARCENY—Indictment.—In a prosecution for theft of railroad tickets, it was not necessary that the indictment should charge possession in a servant of the agent of the railroad company who had physical custody thereof.—*Kush v. State, Tex.*, 77 S. W. Rep. 790.

86. LICENSES—Public Nuisance.—Abutting owner may maintain injunction against a person obstructing street by the erection of a permanent building upon it, if it injures the lot.—*Pence v. Bryant, W. Va.*, 46 S. E. Rep. 275.

87. **LICENSES—Use of City Streets.**—Ordinance requiring license for vehicles carrying freight over city streets, and providing for the punishment by fine of any person doing business without such license, held not to apply to nonresidents of the state, doing business out of the state, but delivering goods in the city.—*Dooley & Bayless v. City of Bristol, Va.*, 46 S. E. Rep. 296.

88. **LIFE INSURANCE—Law of What State Applies.**—Terms of a life policy made in this state held to exclude the operation thereon of a statute of another state.—*Washington Life Ins. Co. v. Glover, Ky.*, 78 S. W. Rep. 146.

89. **MARRIAGE—Between Relations Within Forbidden Degrees.**—A marriage between relations within forbidden degrees will be annulled at the instance of either party.—*Martin v. Martin, W. Va.*, 46 S. E. Rep. 120.

90. **MARRIAGE—Cohabitation by Agreement.**—Cohabitation pursuant to agreement held not a valid marriage, where woman's former husband still lives.—*Blanks v. Southern Ry. Co., Miss.*, 35 So. Rep. 570.

91. **MASTER AND SERVANT—Contributory Negligence of Flagman Causing his Death.**—In an action for death of a railroad crossing flagman, plaintiff held not entitled to recover, notwithstanding decedent's contributory negligence, under the humanitarian doctrine.—*Koons v. Kansas City S. B. R. Co., Mo.*, 77 S. W. Rep. 755.

92. **MASTER AND SERVANT—Discharge of Employee.**—Where an employee has been discharged and has acquiesced in such discharge, he is not required to return to the employer's service at the request of the latter.—*Yeungberg v. Lamberton, Minn.*, 97 N. W. Rep. 571.

93. **MASTER AND SERVANT—Fellow-Servants.**—Operatives of a train, by whose negligence a railroad section hand was killed in passing between sections thereof after working hours, held fellow-servants of deceased for whose negligence the railroad company is not liable.—*Dishon v. Cincinnati, N. O. & T. P. Ry. Co., U. S. C. C.*, E. D. Ky., 126 Fed. Rep. 194.

94. **MASTER AND SERVANT—Fellow-Servants.**—Railway employees, engaged in the common work of cleaning an engine, held fellow-servants.—*Galveston, H. & S. A. Ry. Co. v. Cloyd, Tex.*, 78 S. W. Rep. 43.

95. **MASTER AND SERVANT—Presumption That Child was Careful.**—In an action for negligence causing the death of a boy 13 years of age, the presumption was that the boy was careful.—*Rogers v. Samuel Myerson Printing Co., Mo.*, 78 S. W. Rep. 79.

96. **MASTER AND SERVANT—Proximity of Post to Track Cause of Brakeman's Death.**—The maintenance of a post so close to a railroad track that a brakeman could be struck thereby while riding on the side of a car in the performance of his duties held negligence, entitling a brakeman so injured to recover.—*Galveston, H. & S. A. Ry. Co. v. Brown, Tex.*, 77 S. W. Rep. 832.

97. **MUNICIPAL CORPORATIONS—Maintaining Sewer on Plaintiff's Land.**—A city held not to have acquired by prescription the right to maintain a sewer on a person's land.—*City of Chillicothe v. Bryan, Mo.*, 77 S. W. Rep. 465.

98. **MUNICIPAL CORPORATIONS—Notice of Defective Sidewalks.**—Where it was policeman's duty to report defects in sidewalks, notice to him of such defect is notice to the city.—*City of San Antonio v. Talerico, Tex.*, 78 S. W. Rep. 28.

99. **MUNICIPAL CORPORATIONS—Ordinance Prohibiting Explosion of Firecrackers.**—City ordinance prohibiting the explosion of firecrackers held to be within police power of the city.—*City of Centralia v. Smith, Mo.*, 77 S. W. Rep. 458.

100. **MUNICIPAL CORPORATIONS—Use of Streets.**—A city may maintain an action to test the legality of the occupancy and molestation of its streets by any one.—*Ray v. Colby & Tenney, Neb.*, 97 N. W. Rep. 597.

101. **MUNICIPAL CORPORATIONS—Violation of Ordinance.**—An affidavit on which is based a prosecution for the violation of an ordinance, held sufficient, if it in-

forms the accused what acts are complained of and what ordinance has been violated.—*State v. Thompson, La.*, 35 So. Rep. 582.

102. **NEGLIGENCE—Driver's Negligence not Imputable to Person With Him.**—Negligence of driver of an ice wagon held not imputable to a boy who rode with him, and whose duty it was to deliver ice.—*Baxter v. St. Louis Transit Co., Mo.*, 78 S. W. Rep. 70.

103. **NEGLIGENCE—Res Ipsa Loquitur.**—The fact that the top of a pear burner blew off while it was being operated in accordance with the directions held insufficient to raise a presumption of negligence in its construction on the part of the manufacturers.—*Talley v. Beever & Hindes, Tex.*, 78 S. W. Rep. 23.

104. **NEW TRIAL—Newly Discovered Evidence.**—Where newly discovered evidence is unerring and convincing, satisfying the mind of the judge that it will probably have a preponderating influence upon another trial, a new trial should be granted.—*Owsley v. Owsley, Ky.*, 77 S. W. Rep. 397.

105. **PARENT AND CHILD—Character of Mother in Action for Custody of Child.**—In a contest between a paternal grandfather and a mother for the custody of an infant, it is error to exclude the issue as to the mother's reputation for chastity and veracity.—*Ward v. Ward, Tex.*, 77 S. W. Rep. 829.

106. **PARENT AND CHILD—Liability for Wife's Board When She Remains With Parents.**—Where a daughter lived with her mother after marriage, and performed household services, the mother was not entitled to recover for the daughter's board, in the absence of an express contract to pay therefor.—*Terry v. Warder, Ky.*, 78 S. W. Rep. 154.

107. **PARTNERSHIP—Duty of Keeping Books.**—In suit to settle partnership, plaintiff cannot recover, where books are so confused that commissioner is unable to make any settlement.—*Slaughter v. Danner, Va.*, 46 S. E. Rep. 289.

108. **PAYMENT—Burden of Proof.**—The burden of proof is on defendant to establish payment, and on plaintiff to show that an admitted payment was properly applied on another debt.—*Davis v. Hall, Neb.*, 97 N. W. Rep. 1023.

109. **PLEADING—Admission in Defendant's Abandoned Answer.**—Plaintiff held not entitled to separate, for his own purposes, an admission in defendant's abandoned answer from a further allegation of the answer militating against plaintiff.—*Clark v. Missouri, K. & T. Ry. Co., Mo.*, 77 S. W. Rep. 882.

110. **PLEDGES—Bills of Lading.**—Lien of bank on cotton, to the purchasers of which it had advanced money on the bills of lading, held terminated by the delivery to the bank of the proceeds of the sale of the cotton.—*First Nat. Bank v. San Antonio & A. P. R. Co., Tex.*, 77 S. W. Rep. 410.

111. **PRINCIPAL AND AGENT—Irrevocable Power of Attorney.**—When a power of attorney is coupled with an interest, or is a part of the security, the power is irrevocable.—*Buffalo Land & Exploration Co. v. Strong, Minn.*, 97 N. W. Rep. 575.

112. **PRISONS—Reform School not a Prison.**—A reform school is not converted into a place of punishment by the fact that the law, pervaded by a spirit of humanity, also permits certain youthful criminals to be committed for reformation.—*Rule v. Geddes, Dist. of Colo. App.*, 32 Wash. Law Rep. 35.

113. **PUBLIC LANDS—Actual Settler.**—An actual settler on school land, who claims the right to purchase additional land, must not only have actually occupied and settled upon his land, but must intend to make it his home.—*Mahoney v. Tubbs, Tex.*, 77 S. W. Rep. 822.

114. **PUBLIC LANDS—Findings of Land Office.**—Where findings by the general land office, approved by the secretary of the interior, were not made on any controverted facts, the conclusions of the officers were conclusions of law, reviewable by the courts.—*Buffalo Land & Exploration Co. v. Strong, Minn.*, 97 N. W. Rep. 575.

115. **PUBLIC LANDS**—Purchaser in Good Faith of Detached Sections.—Right of persons to purchase public lands as detached sections held not prevented by their inducing another to buy other lands, so as to make such sections detached, where he purchased in good faith.—*Mancy v. Eyres, Tex.*, 77 S. W. Rep. 428.

116. **RECEIVERS**—Trust Company not Required to Give Bond.—Where a trust company is properly doing business in the state, and is appointed a special receiver, it is not required to give bond, under Acts 1901, p. 187, ch. 85, § 5.—*Goff v. Goff, W. Va.*, 46 S. E. Rep. 177.

117. **RELEASE**—Personal Injuries.—Release of a claim for personal injuries held to include injuries to the injured party's eyesight, though the existence of such injuries was not known when the release was executed.—*Quebe v. Gulf, C. & S. F. Ry. Co., Tex.*, 77 S. W. Rep. 442.

118. **SALES**—Replevin.—Plaintiff, having made a conditional sale of a horse to H, may within three years of the delivery to H, the condition not having been complied with, recover it of one buying it of H without notice.—*Young v. Salley, Miss.*, 35 So. Rep. 571.

119. **SALES**—Right to Rescind.—A writing giving a purchaser a right to reject the article sold within a certain time held a part of the contract of sale.—*Watts v. National Cash Register Co., Ky.*, 78 S. W. Rep. 118.

120. **SCHOOLS AND SCHOOL DISTRICTS**—Purchase of School Site.—A school district board has no authority to purchase or lease a schoolhouse site, unless directed at an annual or special meeting of the electors.—*Ladd v. School Dist. No. 6, Hall County, Neb.*, 97 N. W. Rep. 594.

121. **SEDUCTION**—Showing of Continuous Association as a Corroboration of an Engagement.—Continuous association of defendant and prosecutrix for two years is not alone sufficient corroboration of her testimony as to their engagement, on a prosecution for seduction.—*Fine v. State, Tex.*, 77 S. W. Rep. 806.

122. **STREET RAILROADS**—Attempt to Cross in Front of Approaching Car.—Plaintiff's intestate who was killed while attempting to cross a street in front of an approaching street car, held guilty of contributory negligence, precluding recovery.—*Ries v. St. Louis Transit Co., Mo.*, 77 S. W. Rep. 734.

123. **STREET RAILROADS**—Children Walking on Track.—A motorman of street car held to have had a right to presume that children, walking along the track ahead of the car, would get out of the way.—*Jett v. Central Electric Ry. Co., Mo.*, 77 S. W. Rep. 738.

124. **STREET RAILROADS**—Motorman's Duty Upon Discovering Person in Dangerous Position.—A motorman in charge of a street car must stop his car before reaching a person exposed to danger on the track if he has time to do so after discovering the perilous position.—*Kube v. St. Louis Transit Co., Mo.*, 78 S. W. Rep. 55.

125. **TAXATION**—National Bank.—A national bank held not liable for the penalty for non-payment of taxes, in an action to recover an amount exceeding that which was legally due.—*First Nat. Bank v. City of Lampasas, Tex.*, 78 S. W. Rep. 42.

126. **TELEGRAPHS AND TELEPHONES**—Mental Suffering.—A telegraph company held liable for mental suffering resulting from its negligence in failing to deliver promptly a message sent to a non-resident plaintiff.—*Western Union Tel. Co. v. Anderson, Tex.*, 78 S. W. Rep. 34.

127. **TELEGRAPHS AND TELEPHONES**—Proximate Cause of Plaintiff's Mental Anguish.—A telegraph company held guilty of negligence in delaying the delivery of a message, which negligence was the proximate cause of plaintiff's mental anguish.—*Western Union Tel. Co. v. Shaw, Tex.*, 77 S. W. Rep. 433.

128. **TRESPASS**—Vexation, Humiliation and Annoyance as Elements for Exemplary Damages.—In an action against a municipal corporation for trespass on land, plaintiff cannot recover for vexation, humiliation and annoyance.—*Ostrom v. City of San Antonio, Tex.*, 77 S. W. Rep. 829.

129. **TRIAL**—Absence of Attorney.—In a cause involving a question of law only, held, that no substantial right

was prejudiced by ordering a cause to trial, when one of appellant's attorneys could not be present.—*Hazelwood v. Webster, Ky.*, 77 S. W. Rep. 128.

130. **TRIAL**—Submission of Questions.—Where the questions of the verdict, which were submitted and answered, covered all the material issues of fact, it was not error to refuse to submit other questions.—*Boyce v. Wilbur Lumber Co., Wis.*, 97 N. W. Rep. 563.

131. **TRUSTS**—Contemporaneous Parol Agreement.—A parol agreement that a reserved life estate in a deed was intended only as security for the grantee's performance of a contract to support the grantor held unenforceable as an implied or resulting trust.—*Hall v. Small, Mo.*, 77 S. W. Rep. 733.

132. **TRUSTS**—Family Support.—Presumption that payments for support of family by a trustee of married woman were made by her direction cannot be indulged where evidence is to contrary.—*Owsley v. Owsley, Ky.*, 77 S. W. Rep. 394.

133. **UNITED STATES**—Material Furnished Dredging Contractor.—Coal furnished to a party having a dredging contract with the United States, and used by him in the operation of the dredging, is not material supplied and used in the prosecution of the work within the meaning of the act of Congress of August 13, 1894, 28 Stat. 278.—*United States v. Surety Company, Dist. of Col. App.*, 32 Wash. Law Rep. 53.

134. **UNITED STATES**—Termination of Contract of Hiring.—A laborer or mechanic, employed by the United States under a contract fixing his wages, who knowingly works more than eight hours per day without any agreement for additional pay, cannot recover the same, either under the eight-hour labor law or the army regulation making eight hours a day's work.—*United States v. Moses, U. S. C. C. of App., Ninth Circuit*, 126 Fed. Rep. 58.

135. **VENDOR AND PURCHASER**—Constructive Notice.—A title bond gives the vendee equitable title to the land; and, he having conveyed the land by deed recorded during the vendor's life, constructive notice thereof is given purchasers from the vendor's heirs.—*Lewis v. Sizemore, Ky.*, 78 S. W. Rep. 122.

136. **WARRANTY**—Contract for Future Delivery.—Under a contract between a dealer in eggs and a baker, whereby the former agreed to deliver to the latter, from time to time, on demand, a certain class of eggs, in cans, to be used by him in his business as a baker, and which eggs he agrees to accept and pay for at a stipulated price, there is an implied warranty that the goods are in proper condition and suitable for the purpose for which they are intended.—*Armour & Co. v. Gundersheimer, Dist. of Col. App.*, 32 Wash. Law Rep. 117.

137. **WILLS**—Action to Recover Dower.—To bar a widow's dower right for failure to renounce her husband's will, the will must make a provision for her use in lieu of dower.—*Sperry v. Swiger, W. Va.*, 46 S. E. Rep. 125.

138. **WILLS**—Misdescription of Property in Will.—Where there is an evident misdescription of real property in a will, a court will not hesitate to carry out the intention of the testator, if it can be done without disregarding all settled rules.—*In re Pope's Estate, Minn.*, 97 N. W. Rep. 1046.

139. **WILLS**—Unlawful Cohabitation as Ground for Undue Influence.—In a will case, where it is charged that the will was procured by undue influence, the fact of unlawful cohabitation between the testator and the person who is alleged to have exerted the influence, is an element in the proof of undue influence; but such fact can avail nothing without some proof that it operated to influence the testator in making his will.—*Stant v. Security and Trust Co., Dist. of Col. App.*, 32 Wash. Law Rep. 38.

140. **WITNESSES**—Impeachment.—It is competent to cross-examine a witness as to alleged statements which varied with his testimony in chief, and to contradict him if he denies the statements.—*Brunnemer v. Cook & Bernheimer Co.*, 85 N. Y. Supp. 954.